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No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES POSTAL SERVICE, PETITIONER

v.

UNITED PARCEL SERVICE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-50a) is reported at 604 F.2d 1370. The opinion of the district court (App. D, *infra*, 55a-115a) is reported at 455 F. Supp. 857.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 51a-52a) was entered on August 7, 1979, and

a petition for rehearing was denied on October 9, 1979 (App. C, *infra*, 53a-54a). On December 28, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 7, 1980 (App. E, *infra*, 116a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Postal Service may conduct a limited, temporary marketplace experiment to test the feasibility and desirability of possible changes in mail rates or classifications, without first obtaining the approval of the Postal Rate Commission in accordance with the statutory procedures applicable to permanent changes in rates or classifications.

STATUTES INVOLVED

39 U.S.C. 403(a) provides in pertinent part:

> The Postal Service shall plan, develop, promote and provide adequate and efficient postal services at fair and reasonable rates and fees. * * *

39 U.S.C. 3622(a) provides:

> From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

39 U.S.C. 3623(b) provides:

> Following the establishment of the [initial] mail classification schedule * * *, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

STATEMENT

1. The Postal Reorganization Act of 1970, 39 U.S.C. 101 *et seq.*, abolished the Post Office Department and created the United States Postal Service as "an independent establishment of the executive branch of the [federal] Government" (39 U.S.C. 201). The Act provides that an 11-member Board of Governors shall direct the exercise of the Service's powers. 39 U.S.C. 202. Nine Governors (no more than five of whom may be adherents of the same political party) are appointed by the President with the advice and consent of the Senate. They serve staggered nine-year terms. The Governors in turn appoint the Postmaster General, who is the Service's chief executive officer and serves as a member of the Board. Together, the Governors and the Postmaster General appoint the Board's eleventh member, the Deputy Postmaster General. 39 U.S.C. 202(c), (d), 203.

By regulation promulgated under authority delegated by the Board of Governors, the Postal Service has established its Executive Committee, the "organization through which the Postmaster General and his top staff collectively consider and act on major policy, planning, and other management control mat-

ters." 39 C.F.R. 221.5(d)(1). The Executive Committee is composed of the Postmaster General, the Deputy Postmaster General, seven Assistant Postmasters General, the Chief Postal Inspector, and the General Counsel.

The Reorganization Act created the Postal Rate Commission in addition to the Postal Service. Like the Service, the Commission is an "independent establishment of the executive branch of the [federal] Government" (39 U.S.C. 3601). The Commission is composed of five Commissioners (no more than three of whom may be adherents of the same political party) appointed by the President with the advice and consent of the Senate. The Commissioners serve staggered six-year terms.

In a subchapter entitled "Permanent Rates and
scribes the respective roles of the Governors and the Commission in "establish[ing] reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal service" (39 U.S.C. 3621). Typically, the Postal Service, after considering the available data and obtaining authorization from the Board of Governors (see 39 C.F.R. 3.4(h), (i)), submits a proposed permanent change in rates or mail classifications to the Commission and requests the Commission to forward a recommended decision on the proposal to the Governors. In evaluating such a proposed change, the Commission must consider the specific factors enumerated in 39 U.S.C. 3622(b) (changes in rates or fees) or 39 U.S.C.

Classes of Mail," 39 U.S.C. 3621-3628, the Act de-

3623(c) (changes in the mail classification schedule). Before reaching its recommended decision, the Commission is required, under 39 U.S.C. 3624(a), to afford the Postal Service and users of the mails an opportunity for a public hearing on the record, in accordance with the Administrative Procedure Act, 5 U.S.C. 556 and 557. The recommended decision transmitted from the Commission to the Governors must "include a statement specifically responsive to the criteria established under section 3622 or 3623, as the case may be." 39 U.S.C. 3624(d).

On receiving a recommended decision from the Commission, the Governors must choose one of the options provided in 39 U.S.C. 3625. The Governors may (a) approve the decision and order it into effect; (b) allow the decision to take effect under protest and either (1) seek judicial review under 39 U.S.C. 3628 or (2) return the decision to the Commission for reconsideration; or (c) reject the decision and permit the Postal Service to resubmit its proposal for reconsideration. If the Postal Service resubmits a requested change, the Commission must render a further recommended decision. At that stage, the Governors may exercise any of the options previously available or they may modify the Commission's recommendation if they expressly find that

> (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations

will equal as nearly as practicable estimated total costs.

39 U.S.C. 3625(d). Unless the Governors make these findings, they may not order into effect a change in rates or classifications not recommended by the Commission. Judicial review of the Governors' decision to "approve, allow under protest, or modify" the Commission's recommendation is available in "any court of appeals of the United States" at the instance of an aggrieved party who appeared at the public hearing conducted by the Commission. 39 U.S.C. 3628.

2. On September 26, 1977, the Executive Committee of the Postal Service approved the Local Parcel Service Test Plan, a parcel post experiment designed to test the feasibility and desirability of reduced third- and fourth-class bulk postage rates, calculated on a fixed fee per item basis, for mailings within a single Bulk Mail Center service area. App. A, *infra*, 2a-4a; App. D, *infra*, 60a-62a; A. 17-27, 35-46.[1] The test program was not available to the public generally, but was limited to 20 volunteer shippers in five metropolitan areas.[2]

The shippers agreed to provide a minimum daily and weekly volume of qualified parcels, to segregate those parcels from other mailings, and to place them in appropriate containers. The Postal Service agreed

[1] "A." refers to the appendix in the court of appeals.

[2] The five areas were: Seattle, Washington; Dallas-Fort Worth, Texas; Omaha, Nebraska; Boston, Massachusetts; and Washington, D.C. A list of the shippers involved is reprinted at A. 49.

to determine the applicable postage rate by weighing randomly selected samples of a shipper's parcels. If the average sample weight was five pounds or less, the shipper paid $0.87 per parcel; if the average weight was more than five pounds but not more than 20 pounds, the shipper paid $1.15 per parcel. These rates were lower than those generally available to Postal Service customers and were not tied to the distance a particular parcel was mailed within the designated service area. See App. D, *infra*, 61a & n.7.

The experiment began in mid-October 1977 and was scheduled to continue for approximately 12 months. Shortly before the test began, its features and purposes were described and discussed at a regularly scheduled open meeting of the Board of Governors. 42 Fed. Reg. 51727 (1977); A. 14, 50-52. The Postal Service undertook the experiment in order to determine whether it should request the Commission to recommend permanent changes in rates and classes of mail to the Governors.

3. On October 20, 1977, respondents United Parcel Service, Inc. of New York and United Parcel Service, Inc. of Ohio filed this action in the United States District Court for the Eastern District of Pennsylvania. They alleged that they would "suffer a material diversion of parcels and a consequent loss of revenues" if the Postal Service were permitted to proceed with the Local Parcel Service Test Plan (A.9). Respondents sought a permanent injunction against the experiment on two grounds. First, they argued that the test program entailed a change in

rates and mail classifications that could become effective only if the Postal Service complied with the procedures for obtaining a recommended decision from the Postal Rate Commission in accordance with 39 U.S.C. 3622-3624. Second, respondents contended that, by making favorable bulk postage rates available only to shippers participating in the experiment, the Postal Service was unreasonably discriminating among users of the mails, in violation of 39 U.S.C. 403(c).

Adopting the first of respondents' arguments and not reaching the second (see App. D, *infra*, 63a-64a n.10), the district court granted permanent injunctive relief. The court acknowledged that "as a matter of pure policy the result advocated by the Postal Service is more desirable" (*id.* at 65a). Nevertheless, the court held that the plain language of the statute "compels the conclusion" that even "a reasonable, limited, and temporary experiment * * * conducted as a research and development activity" may be implemented only through the Commission review procedure established by 39 U.S.C. 3622-3624. The court reasoned that the experiment at issue here involves a change in rates and mail classifications and therefore falls within the ambit of Sections 3622 and 3623.[3] Although the court conceded that many of the

[3] The district court attributed no significance to the heading of the statutory subchapter in which Sections 3622 and 3623 appear. Although the heading indicates that the sections apply only to "Permanent Rates and Classes of Mail," the court held (App. D, *infra*, 102a n.21) that Section 11(b) of the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 785, precludes all use of such captions as a tool of statutory construction. Section 11(b) provides:

> An inference of a legislative construction is not to be drawn by reason of a chapter in title 39, United States Code, as enacted by section 2 of this Act, in which a section is placed nor by reason of the caption or catchline.

criteria listed in Sections 3622(b) and 3623(c) "do seem out of place when applied to experiments" (App. D, *infra*, 107a), the court concluded that the "catch-all provisions" in Sections 3622(b)(9) and 3623(c)(6) might well afford the Commission sufficient flexibility to conduct a meaningful review of test programs proposed by the Postal Service. In any event, the district court declared (App. D, *infra*, 110a):

> It is not for us * * * to articulate the evidentiary factors the Commission might consider and to erect the procedural structure in which it would conduct its review. Our role is confined to determining whether, consistently with the statutory purposes, Congress might reasonably have intended, as the plain language suggests, that the Postal Service go to the Postal Rate Commission before any rate or mail classifications are changed, experimentally or otherwise.

A divided panel of the court of appeals affirmed (App. A, *infra*, 1a-50a). Following the analysis of the district court, the court of appeals ruled that "the Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission" (*id.* at 13a). The court asserted that, if limited experiments could be conducted without Commission review, the Postal

Service would effectively be authorized "to make substantial *de facto* and unregulated changes in either rates or mail classifications so long as the changes made were neither 'permanent' nor 'nationwide' " (*id.* at 22a). The court assumed *arguendo* that the general powers conferred on the Postal Service by 39 U.S.C. 401(10) and 403(a) are sufficient to permit marketplace experiments in furtherance of the Service's statutory obligation to "plan, develop, promote, and provide adequate and efficient postal services." But, the court insisted (App. A, *infra*, 26a), "any proposal which would effect a change in mail classification or a rate, including a test or experiment embodying those features, must be submitted to the Rate Commission, no matter how experimental, temporary, or limited in scope the change."

Judge Higginbotham dissented (App. A, *infra*, 29a-50a). Emphasizing that both the statutory language and the legislative history of the Reorganization Act are silent on the question of rate and classification experiments, Judge Higginbotham looked to the overall purpose that the 1970 restructuring was designed to achieve. He found that, in creating the Postal Service, Congress intended to remedy past inefficiencies attributable to "a lack of managerial flexibility and freedom" and "a lack of centralized control" (*id.* at 35a-36a). In Judge Higginbotham's view, "Congress went to considerable effort to give the Postal Service full management authority" in order to ensure that postal modernization would not be obstructed by unnecessary administrative hurdles

(*id.* at 34a). In keeping with this overriding legislative goal, Judge Higginbotham concluded that the Act does not bar the Postal Service from engaging in a "modest and limited experiment * * * designed to develop data on new techniques for the handling of parcel post and the effect of different rates and classifications" (*id.* at 30a, 41a). The dissenting judge supported his conclusion by noting the incompatibility of the Commission's statutory review procedures with test programs intended to collect information of the very kind necessary for a meaningful hearing on the desirability of particular rate or classification changes (*id.* at 42a-45a).

REASONS FOR GRANTING THE PETITION

The district court and the court of appeals have misconstrued the Postal Reorganization Act in a way that threatens to defeat the salutary purpose Congress sought to achieve in its 1970 reform of the postal system. If the Postal Service must seek a recommended decision from the Rate Commission before it may conduct any marketplace experiments involving rates or mail classifications, the Service will be severely hampered in its efforts to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. 403(a). As a practical matter, the Service will be unable to gather the detailed empirical information needed for reliable evaluation of potential changes in the postal rate structure or mail classification schedule. Review by this Court is necessary to

reinstate the division of administrative responsibility established by Congress and thus to permit the Postal Service to fulfill its statutory mandate unhindered by bureaucratic obstacles of precisely the kind Congress sought to eliminate in the 1970 Act.

1. A principal motivation for passage of the Postal Reorganization Act was the congressional recognition that the Post Office Department suffered under the burden of "serious handicaps * * * imposed * * * by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with the modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service * * *." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 2 (1970). By abolishing the Department and creating a new, independent Postal Service, Congress hoped to rid the mail system of inefficiencies attributable to political interference and to a lack of effective, centralized management authority. The Senate Committee Report, for example, referred to "the obvious requirement that postal management must now be given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service." S. Rep. No. 91-912, 91st Cong., 2d Sess. 2 (1970). See also H.R. Rep. No. 91-1104, *supra*, at 5; App. A, *infra*, 34a-38a (Higginbotham, J., dissenting); 116 Cong. Rec. 19844 (1970) (remarks of Rep. Dulski, Chairman of the House Committee on Post Office and Civil Service); *id.* at 20491-20492 (remarks of Rep. Hamilton).

The management authority and flexibility desired by Congress are especially important in connection with the development and timely modification of the postal rate structure and mail classification schedule. In the words of the House Committee (H.R. Rep. No. 91-1104, *supra*, at 5), "[t]he postal system needs, and the American public deserves, a means of determining and adjusting postal rates that is readily responsive to changing economic conditions and that brings to bear expert analysis and technical proficiency on the highly intricate problems of ratemaking." Indeed, both the district court and the court of appeals in the present case acknowledged that, as a policy matter, the Postal Service should have the authority to test possible rate or classification changes without undertaking a formal administrative proceeding before the Rate Commission. App. A, *infra*, 28a n.16; App. D, *infra*, 65a, 114a. Both courts concluded, however, that the statutory language adopted by Congress does not confer such authority on the Service.

Congress itself perceived no such limitation on the Service's powers. The House Committee Report explicitly stated (H.R. Rep. No. 91-1104, *supra*, at 9): "The Postal Service is required to develop and provide adequate and efficient postal service at fair and reasonable rates * * *. The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States." The Act contains not only a specific provision referring

to the Service's duty to "plan, develop, promote, and provide adequate and efficient postal services" (39 U.S.C. 403(a)) but also a general provision granting the Service all "powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers" (39 U.S.C. 401(10)). This broad language is sufficient to comprehend the limited parcel post experiment at issue here.[4]

2. No other provision in the Postal Reorganization Act restricts the Service's authority to conduct limited, temporary experiments for the purpose of gathering data concerning possible adjustments in prevailing rates or classifications. The courts below erred in attributing such a restrictive effect to 39

[4] At minimum, Congress' repeatedly expressed intention to grant postal managers greater authority supports the conclusion that the Reorganization Act should not be construed to deny the Postal Service powers previously exercised by the Postmaster General under the statutory scheme in effect before 1970. Yet that is the consequence of the court of appeals' decision in this case. Under 39 U.S.C. (1964 ed.) 504(a), the Postmaster General was directed to "maintain in the Department a research and development program, including investigations and studies, for the purpose of introducing or improving equipment, supplies, methods, procedures, means, and devices used in the Department in order that its business may be more efficiently and economically operated." This provision was interpreted to authorize the Post Office Department to "engag[e] in experiments as part of a research and development program to improve the economy and efficiency of its business." *United Telegraph Workers, AFL-CIO* v. *FCC*, 436 F.2d 920, 926 (D.C. Cir. 1970). As the court of appeals stated in that case (*ibid.*), "the Post Office's mandate to improve mail service through innovative techniques should not be frustrated by implied or niggardly restrictions upon its authority."

U.S.C. 3622 and 3623. The content and context of those sections demonstrate that they are applicable only to proposed permanent changes in the postal rates and mail classification schedule governing throughout the nation.

Even putting aside the subchapter heading "Permanent Rates and Classes of Mail" in deference to the congressional injunction that captions not be used for purposes of statutory construction (see note 3, *supra*), the provisions establishing the Postal Rate Commission and describing its role and operation show that the Commission was intended only to review and regulate permanent changes in rates and classifications, not to limit the day-to-day activities of the Postal Service in ascertaining whether such changes are necessary or desirable. Section 3622(b) lists numerous factors that must be considered by the Commission in reviewing a Postal Service request for a recommended decision on a change in rates. These criteria make sense only with respect to permanent changes. For example, Section 3622(b)(3) requires the Commission to ensure that "each class of mail or type of mail service bear[s] the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type * * *." The detailed assignment of costs contemplated by this provision is impossible in the context of a temporary experiment. The critical information relevant to cost allocation and the other factors listed in Section 3622(b) is not available until after the experiment

has been conducted. Indeed, experiments like the Local Parcel Service Test Plan are designed and implemented precisely for the purpose of obtaining sufficient information to enable the Postal Service to decide whether to request a rate change from the Commission and, if so, what kind of change to propose. See App. A, *infra*, 42a-43a (Higginbotham, J., dissenting).

Like the substantive inquiries mandated by Sections 3622(b) and 3623(c), the formal hearing procedure required by Section 3624 as a precondition to any recommended decision by the Commission is out of place in the context of a limited, temporary experiment. The Section 3624 hearing requirement was designed to ensure that all users of the mails have an opportunity to be heard before permanent changes in rates or mail classifications are implemented. The elaborate procedural protections established by the statute and the Commission's regulations (see 39 C.F.R. Part 3001) are appropriate in that context, but they cannot profitably be employed as a method of screening test programs that the Service wishes to use to collect data on possible future rate or classification changes. In the first place, a formal Rate Commission proceeding ordinarily requires several months. Delay of this kind is antithetical to the success of marketplace experiments.[5] Moreover, Postal Service

[5] In responding to the Postal Service's argument concerning the inapplicability of the Section 3624 hearing requirement to a proposed experiment, the court of appeals' majority pointed to 39 C.F.R. 3001.54(s), a regulation in which the Rate Commission has provided "a measure of relief" from the administrative burdens ordinarily associated with formal hearings on rate or classification changes. App. A, *infra*, 26a-27a. The regulation cited, however, authorizes only waivers of certain filing requirements and falls far short of eliminating the major obstacles imposed by the court of appeals' ruling that a Section 3624 hearing is a prerequisite to every marketplace experiment involving rates or mail classifications.

competitors eager to thwart the development of new and more efficient postal rates and services may well use information obtained in a Section 3624 hearing to skew the results of a proposed experiment by offering special terms to shippers in an effort to discourage their participation in the test program. Finally, as Judge Higginbotham observed (App. A, *infra*, 43a-44a), experiments, by their very nature, frequently require modification in the course of their performance, but, if the court of appeals' decision is permitted to stand, such adjustments in the light of initial experience will effectively be precluded by the need to return to the Commission for a new and time-consuming proceeding under Section 3624.

The Senate Report confirms the foregoing interpretation of the Act derived from the statutory language. The congressional draftsmen who created the Postal Rate Commission never intended it to pass on every temporary variation in rates or classifications undertaken in order to test possible improvements in the total services provided. That is why, in discussing the Commission's role, the Senate Committee described in detail "[t]he rate-making cycle" and noted that, in the version of the

Reorganization Act approved by the Committee, the Postal Service was required to request "appropriate changes in the rate structure * * * at least once every 2 years, unless the Board's estimates of income and costs are approximately in balance, and the Board does not believe that a change would be in the public interest" (S. Rep. No. 91-912, *supra*, at 14-15). The Committee clearly was referring to permanent rate changes applicable throughout the nation. That is the only way to explain the Committee's instructions that the Rate Commission "recommend a decision on changes in the rate structure which, when implemented, will provide sufficient total revenue to bring the total estimated income and appropriations of the postal service into balance, as nearly as possible, with the total estimated costs" (*id.* at 15). It is difficult to believe that Congress intended such overall calculations to be made in connection with every limited marketplace experiment of the kind at issue here.

3. As Judge Higginbotham's dissenting opinion persuasively demonstrates (App. A, *infra*, 44a-47a), the Postal Service's interpretation of its own statute would not only contribute substantially to the efficient functioning of the nation's postal system but it would do so without infringing the congressionally prescribed prerogatives of the Rate Commission. Congress believed that establishment of the Commission was desirable for several reasons: (1) to "ensure that postal rates reflect[] not only management objectives but also serve[] broader public purposes"; (2) to preserve "some distance from the day-to-day operations

of the Postal Service" in order to facilitate "sound business decisions on rates"; and (3) to guard against political pressure on rate and classification determinations. *Ibid.* None of these concerns is implicated or jeopardized by the Postal Service's conduct of the limited experiment at issue in the present case.

Neither the court of appeals nor the district court offered any support for the assertion that acceptance of the Postal Service's position "would permit unregulated changes in rates and mail classification at any time and under any circumstances whereby less than all members of the public were entitled to benefits stemming from such changes" (App. A, *infra*, 17a-18a). In Judge Higginbotham's apt characterization, "[t]his 'logic' is the worst example of the parade of horribles" (*id.* at 48a). If the Postal Service were to attempt to usurp the authority of the Commission under the rubric of experimentation, both a reviewing court and the Commission itself, in the exercise of its power to deal with rate and service complaints under 39 U.S.C. 3662, would be equal to the task of halting actions inconsistent with the fundamental statutory scheme. But the experiment challenged by respondents is not such an attempt, and the specter raised by the court of appeals' majority is chimerical. Illusory predictions about potential future excesses by the Postal Service should not be permitted to produce a construction of the Postal Reorganization Act that "shackle[s] and prevent[s the Service] from pursuing * * * modest

experimentation * * * [in order] to provide the American public with better service and its major competitor with more robust competition" (*id.* at 30a).

4. This is the first case in which the Postal Service's authority to conduct marketplace experiments independent of the Rate Commission has been challenged. Although there is no conflict among the circuits, further review is essential at this time because the court of appeals' decision is virtually certain to have a nationwide impact. None of the five cities involved in the Local Parcel Service Test Plan is located in the Third Circuit, and the propriety of venue in the Eastern District of Pennsylvania did not depend on whether any of the mailings affected by the experiment was destined for an address in that district.[6] Rather, under 28 U.S.C. 1391(e) and 39 U.S.C. 409(b), the choice of venue was apparently justified on the ground that one of the respondent corporations has "a place of business" in Philadelphia (A. 3) and therefore "resides" in the Eastern District of Pennsylvania.[7] If federal courts may be chosen on this basis, a conflict among the circuits is likely never to arise on the question presented here.

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[6] Indeed, the parties stipulated that none of the Bulk Mail Center service areas involved in the experiment included any states or parts of states within the Third Circuit. A. 31.

[7] Professor Moore reports that the question "whether a plaintiff corporation may claim residence for venue purposes in any district in which it is doing business has produced a split of authority" among the federal district courts. See 1 *Moore's Federal Practice* ¶ 0.142[7], at 1450.2 & n.19 (2d ed. 1979), and cases there cited.

Major competitors of the Postal Service operate nationwide and therefore would presumably challenge any future Postal Service experiment in the Third Circuit. Accordingly, the prospects for appellate review elsewhere are bleak, even assuming the Postal Service could construct other experiments like the Local Parcel Service Test Plan that do not involve any mailings to or from the Third Circuit. Because of the practical importance of the question presented to the Postal Service and its nationwide implications, the final determination should not be left to a divided panel of a single court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2390

UNITED PARCEL SERVICE, INC.,
a New York Corporation,

and

UNITED PARCEL SERVICE, INC., an Ohio Corporation

v.

UNITED STATES POSTAL SERVICE, APPELLANT

Argued March 26, 1979

Decided Aug. 7, 1979

Before GARTH, HIGGINBOTHAM, Circuit Judges, and SCHWARTZ,* District Judge. Circuit Judge Higginbotham dissented and filed an opinion.

GARTH, Circuit Judge.

This is an appeal from a final order of the district court which permanently enjoined the defendant United States Postal Service (hereafter Postal Service) from engaging in a parcel post experiment until it obtained approval from the Postal Rate Commission, in compliance with 39 U.S.C. §§ 3622-25. We affirm.

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* Sitting by designation.

I

In 1970 Congress enacted the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.* The Act created the Postal Service as an independent unit of the executive branch, 39 U.S.C. § 201. It also created the Postal Rate Commission as a separate independent establishment, 39 U.S.C. § 3601.

The Postal Service is governed by a Board of Governors, 39 U.S.C. § 202, which pursuant to 39 U.S.C. § 402 established an Executive Committee. The Executive Committee is comprised of the Postmaster General, the Deputy Postmaster General, various Assistant Postmasters General, the Chief Postal Inspector, and the General Counsel. 39 C.F.R. § 221.5 (d) (1) [1978].

On September 26, 1977 the Executive Committee in accordance with the duty imposed upon the Postal Service to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees," 39 U.S.C. § 403(a), approved implementation of a parcel post experiment called the Local Parcel Service Test Plan. A detailed description of the Plan may be found in the district court's opinion, *United Parcel Service* v. *United States Postal Service*, 455 F.Supp. 857, 861-62 (E.D. Pa. 1978). Suffice it to say that the Postal Service in mid-October 1977 instituted a twelve-month bulk mailing experiment to test the cost and service feasibility of charging a fixed fee per item for each item mailed by twenty selected shippers, rather than calculating the amount of postage by weighing each

individual parcel. Twenty selected shippers in five metropolitan communities [1] entered into contracts with the Postal Service whereby each guaranteed a minimum mailing volume of 50 pieces per day and 250 pieces per week. Delivery of the items was limited to the geographic area covered by the Postal Service Bulk Mail Facility serving the shipper (intra-BMC delivery). Under the test plan eligible articles were (1) items mailable as parcel post and (2) third class single piece mail. "Nonmachineable outsides" (i.e., parcels of unusual dimensions which require hand processing) were not eligible articles. The articles had to be containerized, addressed for delivery in the BMC service area and all special service parcels had to be isolated.

Sample weighings of randomly selected items in the bulk shipment were used to determine the average weight of all items. The cost of mailing each item was based on the average weight thus determined. The cost to the shipper of mailing 50 or more items averaging five pounds or less was 87 cents per item. The cost per item when average item weight was over five, but under twenty, pounds was $1.15 per item. This fixed-fee postage payment system eliminated the need to calculate postage individually on each parcel. In any event, the cost of mailing an item under the test plan differed substantially from the cost of mailing the same item by regular parcel post under the rates and mail classi-

[1] Seattle, Dallas-Ft. Worth, Omaha, Boston and Washington, D.C.

fication schedule then in effect. 455 F.Supp. at 861 n.7, Exhibit 2, Appendix at 47.

United Parcel Service (hereafter UPS), the plaintiff in this action, is a private parcel delivery service. UPS, complaining that the Postal Service had no authority under statute or regulation for conducting such an experiment, commenced an action in the Eastern District of Pennsylvania seeking to enjoin the Postal Service test.

The Postal Service, however, asserting that its test involved neither a change in rates nor a change in classification of mail within the meaning of 39 U.S.C. §§ 3622-23, claimed that such a Plan did not require submission to approval by, or authorization of the Rate Commission.[2]

The Postal Service and UPS submitted the issues to the district court on a stipulation of facts together with certain exhibits and affidavits. Although expressing its belief that "as a matter of pure policy the result advocated by the Postal Service is more desirable . . . ." 455 F.Supp. at 863, the district court held that the test plan effected a change in a postal rate and a mail classification. Agreeing with

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[2] At no time did the Postal Service contend that the rates charged to the shippers participating in the test plan were the same rates then being charged for regular parcel post mailings. Nor has it urged that the classifications under the test plan for the twenty selected shippers were the same as the prevailing classifications established for all other shippers. Nor has the Postal Service ever argued that Rate Commission approval would not be required if it sought to institute any feature of its test plan or the test plan itself on a permanent nationwide basis.

UPS, it thereupon entered an order on July 19, 1978 which ". . . permanently enjoined [the United States Postal Service], from continuing in operation the parcel post experiment known as the Service Test Plan until such time as it has complied with the provisions of 39 U.S.C. §§ 3622-25 (which we have held applicable here)." The statutes which the district court held to be applicable and with which the Postal Service was obliged to comply would require a recommended decision by the Rate Commission approving the test plan. This appeal followed.

II

Congressional dissatisfaction with postal inefficiency reached a peak in 1970. It was then that the Postal Service was established pursuant to the Reorganization Act. Congressional declarations of postal policy resulted in a direction that the Postal Service be "operated as a basic and fundamental service provided to the people . . ." 39 U.S.C. § 101 (a). At the same time, Congress commanded that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d). In order to eliminate any effect of policies and special interest lobbying on rate-setting and mail classification, Congress completely delegated its rate-setting authority. The power to set rates of postage and to establish classes of mail was vested in the nine Presi-

dentially appointed Governors [3] of the Postal Service. That power, however, was limited to the extent that the Governors' authority over rates and classifications could only be exercised *after* comprehensive review and recommendation by the Postal Rate Commission, the regulatory agency which Congress created to oversee the ratemaking and mail classification process.

The Postal Rate Commission is completely independent of the Postal Service. It is comprised of five Commissioners appointed by the President with the advice and consent of the Senate. 39 U.S.C. § 3601. The concept of the Postal Rate Commission in the statutory scheme was described in the Senate Report in these terms:

> The bill [Postal Reorganization Act] provides that the Postal Rate Commission shall be a body fully independent of the Board of Governors and fully independent of any influence whatsoever of the Postmaster General or of members of his staff. The Commission's independence is contemplated as being complete from the other arms of the postal service, subject to no subordination within the postal service either expressed or implied. The limited circumstances under which a

[3] 39 U.S.C. § 102(3). The Governors are appointed with the advice and consent of the Senate and are to represent the public interest in the exercise of the powers of the Postal Service by the Board of Governors. The Board has eleven members—the nine Governors plus the Postmaster General and Deputy Postmaster General both of whom are *officers* of the *Postal Service* and are appointed by the Governors. 39 U.S.C. § 202.

> recommended rate decision made by the Commission may be modified by the Governors are carefully spelled out in the language of the bill.
>
> It is expected that the Commission will work in harmony with the Board of Governors, acting in a timely and responsive manner to the Board's requests for recommended decisions for changes in rates, fees and classifications.
>
> In discharging the highly important responsibilities vested in the Commission, it must exercise its best judgment to insure that all postal rates, fees, and classifications are reasonable and equitable, and to insure that the rights of all mail users are protected, throughout the ratemaking and classification process, by careful consideration of all the specific public-interest factors that the statute requires be taken into account, and by faithful adherence to all of the ratemaking and classification standards set forth in the statute.

S. Rep. 91-912, 91st Cong., 2d Sess. at 13-14. In establishing the "partnership" between the Board of Governors and the Rate Commission, the Senate Committee expressed a fear that:

> if the Board of Governors were authorized to control revenues, it would place them in a position of some businesses in the private sector of the economy—pricing with one eye . . . over their shoulder to the effect of the cost of an upcoming labor-management agreement.

Id. at 13.

As an example of the need for independence of the Rate Commission, the Senate Committee referred to a proposal to raise first-class mail rates:

> The recent proposal for a 10-cent first-class stamp in order to raise sufficient revenue to balance the books of the Post Office in one single step is fair proof of that quest for catching up with costs. Most of the money in the postal system comes from first-class mail. A 100-percent increase in the rates for all second-clas mail would not produce as much revenue as a 5-percent increase in the first-class rate. The temptation to resolve the financial problems of the Post Office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

Id. at 13. It was the Senate's view of the Rate Commission which ultimately prevailed in conference and consequently that view now finds its expression in 39 U.S.C. §§ 3621-28. The provisions of these statutes implement the concepts deemed important by the Senate Committee. Thus, after one of the most extensive studies in the Committee's history, *S. Rep.* 91-912 at 1, the postal legislation which was enacted transferred from a burdened Congress to the Postal Rate Commission the "highly intricate problems of ratemaking." It did so because the postal rate structure "need[ed] the fulltime skills of professional economists, trained rate analysts, and the like." *H. Rep.* 91-1104, U.S. Code Cong. & Admin. News 1970, p. 3649 *supra*, at 3654.

The Postal Service, while recognizing that changes in rates and mail classifications are committed for all practical purposes to the Rate Commission, nevertheless argues before us that it was not obliged to submit its parcel post test plan to the Rate Commission. Essentially it bases this argument on the assertion that no changes in rates or mail classifications were involved. Additionally it argues that a contrary interpretation of the Act would be inconsistent with Congressional intent to increase flexibility and Postal Service control over postal operations.

III

39 U.S.C. § 3622 requires that any change in a rate of postage be recommended by the Postal Rate Commission.[4] There are nine specified factors in ad-

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[4] 39 U.S.C. § 3622. *Rates and Fees*

> (a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.
>
> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and

dition to the policies of the Act (*see* 39 U.S.C. § 101) which the Commission is to consider in making its recommendation, 39 U.S.C. § 3622(b)(1)-(9).

Just as changes in *rates* are the subject of § 3622, changes in *mail classification* are subject to the provisions of § 3623.[5] That section requires that any

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the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter, and

(9) such other factors as the Commission deems appropriate.

[5] 39 U.S.C. § 3623. *Mail Classification*

(a) Within 2 years after the effective date of this subchapter, the Postal Service shall request the Postal Rate Commission to make a recommended decision on

establishing a mail classification schedule in accordance with the provisions of this section.

(b) Following the establishment of the mail classification schedule requested under subsection (a) of this section, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

(c) The Commission shall make a recommended decision on establishing or changing the schedule in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable classification system for all mail;

(2) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;

(3) the importance of providing classifications with extremely high degrees of reliability and speed of delivery;

(4) the importance of providing classifications which do not require an extremely high degree of reliability and speed of delivery;

(5) the desirability of special classifications from the point of view of both the user and of the Postal Service; and

(6) such other factors as the Commission may deem appropriate.

(d) The Postal Service shall maintain one or more classes of mail for the transmission of letters, sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

change in mail classification be recommended or initiated by the Postal Rate Commission. The policies of the Act and six specified factors are to be considered by the Commission in recommending any such classification change. 39 U.S.C. § 3623(c)(1)-(6).

The Postal Service, contrary to the argument of UPS, contends that the test plan at issue here does not involve a "change" in any "rate" or "mail classification." As such, the Postal Service asserts that its test plan need not be submitted to the Rate Commission, and it therefore need not obtain a recommended decision of that body. We cannot agree.

A

The Postal Service claims that because §§ 3622-23 do not by their express terms require a recommended decision for the conduct of experiments, it may experiment or test in the marketplace without complying with the statutory requirements involving submissions to the Rate Commission. The difficulty with this argument is that while it is clear that §§ 3622-23 do not expressly require Rate Commission approval of Postal Service experiments, it is equally clear that these statutes contain no express exception for experiments which involve changes in rates and classifications.

We recognize that the Postal Service is under a duty to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). In discharging its duty to plan and develop, we can understand

the desire of the Postal Service to institute test plans or experiments so that postal efficiencies will result. However, it is apparent that in fulfilling its duty to "plan, develop [and] promote," the Postal Service is just as subject to the rate and classification provisions of Chapter 36 of the Act, 39 U.S.C. § 3601 *et seq.* as it is in fulfilling its duty "to provide adequate and efficient postal services at fair and reasonable rates and fees." Under the Act no distinction is made in favor of experiments or tests which involve changes in rates or mail classification. Rather, the Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission. In such a posture, the Postal Service argument which relies on an absence of express terminology in the statute, is less than compelling.

B

The Postal Service argues, however, that its parcel post test does not involve any "rate" or "mail classification" let alone any "change" in any rate or mail classification. According to the Postal Service, a "rate" is only a "rate" when it applies and is available to the entire public at large. Conversely, claims the Service, a "rate" is not a "rate" when it is restricted to twenty selected shippers. Similarly, the Service contends that a "mail classification" is not a "mail classification" when it is limited to twenty volunteer participants.

In advancing their respective arguments as to the meaning of "rate", the Postal Service and UPS have engaged in a definitional contest. Each has referred us to varying definitions of "rate" which appear in *Black's Law Dictionary*, 4th Ed., at 1427-28.[6] Just as the district court declined to enter such a fray, so do we. The district court met this challenge to our satisfaction by stating:

> The common meaning of a "rate of postage" is simply the fee the Postal Service charges for processing, transporting, and delivering a particular type of mail. Similarly, the ordinary understanding of a mail classification is nothing more complex than a grouping of mail based on established and shared criteria. *See National Retired Teachers Ass'n* v. *United States Postal Service*, 430 F.Supp. 141, 146 (D.D.C. 1977). The usual interpretation of "change" is alteration or making different.

455 F.Supp. at 863.

The wisdom of interpreting these statutory terms in an "ordinary sense" and giving them an ordinary and common meaning is borne out by reference to other sections of the Act. For example, the Act

[6] The Postal Service in referring to p. 1427 of *Black's Law Dictionary*, 4th Edition, claims that a rate is "a charge to the public for a service open to all and upon the same terms." UPS, relying on p. 1428 of the same volume recites the definition as follows: "As used in the interstate commerce law, [the term rate] means the net cost to the shipper of the transportation of his property; that is to say, the net amount the carrier receives from the shipper and retains."

as it employs the particular terms involved here, distinguishes between a *rate* of postage and an *amount* of postage: the "rate" being the charge for a particular type of mail (i.e. one ounce of first class mail for 15 cents) and the "amount of postage" being the total charge assessed for any particular item of mail at the prescribed rate (i.e.) three ounces of first class mail at 15 cents results in an "amount of postage" of 45 cents).[7] It is completely evident that the amount of postage per item mailed under the test plan was not in accordance with any existing rate which had been recommended by the Rate Commission. Rather, the amount of postage prescribed under the plan was determined only by applying a new rate established by the Postal Service.

By the same token, it is the mail classification which determines which rate of postage is applicable to the particular item mailed. Thus, mail "classification is a 'grouping' of mailing matter for the purpose of assigning it a specific rate or method of handling.

[7] Although the term "rate" is not specifically defined in the Act, nor has it been defined in any of the earlier postal acts, the use of that term prior to 1970 gives some Congressional understanding to its content. For example, in 1967, 39 U.S.C. § 4253(a) prescribed postage on first class mail by stating ". . . [e]xcept as other wise provided . . . the *rate of postage* on first class mail weighing thirteen ounces or less is 6 cents for each ounce or fraction of an ounce." (Italics added). *See also* 39 U.S.C. §§ 4303, 4358-59, 4362, 4422, 4452, 4554 and 4556-57 [1967]. These sections use the term "rate" in the general sense of the *method* by which an *amount* of postage due from the mailer is to be calculated, whether that amount is calculated separately for each piece, as in 39 U.S.C. § 4253(a) (1967), or in bulk, as in 39 U.S.C. § 4422 (1967).

Relevant factors include size, weight, content, ease of handling, and identity of both posting party and recipient." *National Retired Teachers Ass'n* v. *United States Postal Service*, 430 F.Supp. 141, 147 (D.D.C. 1977), *affirmed*, 593 F.2d 1360 (D.C. Cir. 1979) (footnote deleted).[8] Again, it is evident that the Postal Service created *de facto* a new mail classification by virtue of the criteria which it established for participation in the plan, to wit, machineable, containerized, fourth class mail delivered to the BMC in lots of 50 items per day with an average weight of 20 pounds or less and destined for delivery in the BMC service area. Satisfaction of these criteria entitled the mailer to the fixed fee rate for calculating the amount of postage outlined above.

The Act grants the Governors the exclusive and nondelegable authority to establish "*classes of mail*" and "*rates of postage*," 39 U.S.C. §§ 402, 3621, but only after the Governors have received a recommended decision from the Postal Rate Commission. The Postal Service, on the other hand, is only vested with the

[8] Again, although the term "class" or "classification" has not been specifically defined in this or prior acts, it is evident from its usage prior to 1970 that the term simply means a grouping of mail on the basis of shared physical criteria. For example, prior to 1970, first class mail was "mailable (1) postal cards, (2) post cards, (3) matter wholly or partially in writing or typewriting . . ., (4) bills and statements of account, and (5) matter closed against postal inspection." 39 U.S.C. § 4251 [1967]. The size and weight limitations applied to that class were "one hundred inches in length and girth combined" and seventy pounds. 39 U.S.C. § 4252, [1967]. *See also* 39 U.S.C. §§ 4301, 4351, 4421, 4451 and 4551 [1967] establishing criteria for other mail classifications.

power "to prescribe, in accordance with this title, the *amount of postage* and the manner in which it is to be paid," 39 U.S.C. § 404(a)(2). It is thus evident that the amount of postage collected by the Postal Service on any particular piece of mail or parcel must be prescribed in accordance with established rates of postage and established classes of mail. Pursuant to UPS's argument therefore, it would appear that by the institution of its test plan the Postal Service established not only a new classification but also a new rate for that classification. In so doing, UPS claims, the Service has usurped the function assigned by Congress to the Rate Commission and the Governors.

The Postal Service contends, however, that under the Act the terms "rate" and "mail classification" only apply to a *service* made available to *all* members of the public on the *same* terms. If the service is not so available, i.e., if it is restricted to only a portion of the public, then the Service claims that the charges imposed do not constitute a rate and the criteria employed for plan participation do not constitute a mail classification. Hence, the Service argues that anything short of such nationwide availability of a service (such as restricting availability to twenty selected voluntary shippers) does not trigger the rate and mail classification regulatory provisions of Chapter 36 of the Act. It therefore concludes that it may proceed with its test plan without prior recourse to the Rate Commission.

We reject this argument. In essence this position taken by the Postal Service would permit unregulated changes in rates and mail classification at any time

and under any circumstances whereby less than all members of the public were entitled to benefits stemming from such changes. We have been shown nothing in the Act which supports the distinction on which the Postal Service relies and we can find no authorization for such a construction of the Act. To the contrary, the Act specifically proscribes the Postal Service from discriminating among its users. 39 U.S.C. § 403(c) reads:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

As recited earlier, we have found, and the Postal Service has pointed to, no exception which would authorize a test plan such as the one instituted here, in derogation of this section.

While we need not, and do not, decide that a test plan could never be instituted because of the operation of § 403(c), we are nevertheless persuaded that in light of § 403(c) the Postal Service's view of "rate" and "mail classification" is incorrect and cannot prevail.

Not only are the Service's definitions of rate and mail classification unsupported by the Act, and indeed inconsistent with § 403(c) as we have indicated, but apparently the Postal Service itself has recognized that the test plan instituted here involves a change

in rate. The definition urged upon us here by the Postal Service is inconsistent with use of the term "rate" as it was employed by Deputy Postmaster General William F. Bolger when he discussed the test plan during a Postal Forum in September of 1977:

> Basically, the main features of the *test program* are . . . a *greatly simplified rate structure* based on average weights . . . [which] allows mailers to forget weight and zone calculations for most intra-BMC deliveries . . ." (Emphasis added.)

Fairly read, the term "rate" as it appears in the test plan description is employed in a sense significantly different from that suggested by the Postal Service here, but no different from the meaning given it by the district court and approved by us.

C

Consistent with its denial that the charges imposed upon participants in the test plan were "rates," and that the test plan itself constituted a new "mail classification", the Postal Service also urges that the term "change" as it appears in §§ 3622-23 has a meaning different from that normally accorded that word. The Postal Service contends that a change in rate or class only becomes a "change" within the meaning of §§ 3622-23 when it is permanent and nationwide—not experimental, limited or temporary. It argues that because only nationwide changes in postal *services* need be submitted to the Rate Commission under

39 U.S.C. § 3661,[9] that Congress intended that Rate Commission jurisdiction over rates and mail classifications would similarly extend only to matters affecting the entire country. However, neither the Act nor its legislative history suggests that any such qualification upon the word "change" was ever intended or effected in §§ 3622-23.

Although it is true that such a nationwide qualification does exist with respect to changes in the nature of postal *services*, 39 U.S.C. § 3661, no such qualification appears in §§ 3622-23, the statutes with which we are concerned. With respect to postal *services*, Congress clearly contemplated that the nature of such services would vary from one locale to another depending on local conditions such as sparsity of popu-

[9] 39 U.S.C. § 3661. *Postal Services*

(a) The Postal Service shall develop and promote adequate and efficient postal services.

(b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a *nationwide* or *substantially nationwide* basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Rate Commission requesting an advisory opinion on the change.

(c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification by each Commissioner agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

lation, ordinances prohibiting curbside delivery, etc., and that changes in such services would often affect only a relatively small number of people in a limited geographic area. Recognizing the lack of national interest in purely local conditions requiring changes in the nature of postal services, Congress did not require Rate Commission action when such localized changes were effected. However, when a nationwide or substantially nationwide postal service change is proposed, then Congress required that the proposed change be submitted to the Rate Commission—not for a recommended decision (as required for a rate or classification change) but merely for an advisory (and hence not binding) opinion. It is obvious to us that the substantive differences in § 3661 (services) as contrasted with § 3662 (rates) and § 3623 (classifications) reflect different Congressional concerns and therefore different Congressional requirements. Under such circumstances we perceive little value in attempting to construe §§ 3622-23 by reference to § 3661. We perceive even less value in attempting judicially to impose on the plain and comprehensive terms of §§ 3622-23, the special provisions which Congress incorporated in § 3661 for manifestly different purposes and reasons. Moreover, it is quite clear that, if Congress had intended to qualify the provisions of §§ 3622-23 by requiring Rate Commission approval of only nationwide changes, it could have accomplished that task in the same manner as it did in § 3661.

Furthermore, if we were to interpret §§ 3622-23 as the Postal Service urges, we would be permitting the Service to make substantial *de facto* and unregulated changes in either rates or mail classifications so long as the changes made were neither "permanent" nor "nationwide". Such a view finds no support in the Act or in the legislative history. Indeed, such a construction of the Act is capable of completely undermining Congressional regulation *via* the Rate Commission of those aspects of postal affairs which are most heavily infused with the public interest—an interest which the Rate Commission is charged with protecting.[10] As the D.C. Circuit explained, albeit in a different but analogous context,

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[10] The Postal Service's construction is also at odds with the thrust of Congressional intent evident in the 1976 amendments to the Act. Prior to that time, the Rate Commission was not required to act upon a request for a rate change within any specified time period and under 39 U.S.C. § 3641 the Postal Service could institute a temporary rate change 90 days after Rate Commission submission. Substantial delays in Commission action produced new requests for rate changes before final action was taken on older requests. To remedy this, Congress required that the Rate Commission act within 10 months but simultaneously amended § 3641 to preclude the Postal Service from instituting a temporary rate change until that 10-month period had elapsed. The premium placed on Rate Commission consideration of, and public hearings on, rate changes is therefore evident. Permitting experiments which involve changes in rates and mail classifications would effectively overrule § 3641. Such "experiments" could be commenced and continued throughout the 10-month course of Rate Commission consideration, so long as the experiment was neither permanent nor nationwide, according to the Postal Service's interpretation.

> any reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management, and its authority therefore reasonably extends to basic decisions pertaining to the provision of special, non-postal and other services. The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable, and its authority therefore reasonably extends to all aspects of such decisions, including review of budget estimates, allocation of postal costs, establishment of rates for postage, and, it would seem plainly, the setting of fees for those special services which management decides should be provided.

National Association of Greeting Card Publishers v. *United States Postal Service*, 186 U.S.App.D.C. 331, 358, 569 F.2d 570, 597 (1976), *vacated in part not relevant here*, 434 U.S. 884, 98 S.Ct. 253, 54 L.Ed.2d 169 (1977).

Thus we do not find persuasive the Postal Service contention that because only twenty test participants were involved in its test plan no "change" in a "rate" or "mail classification" has been effected.[11]

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[11] The district court expressed its conclusion as follows:

> There is nothing "plainer" than the fact that postal rates and classifications have been changed as to the participants in the Service Test Plan. When the rates

IV

As we indicated earlier, the Postal Service's other major contention is that Congress intended to recognize the need for increased flexibility and Postal Service control over postal operations so that the Service could more readily respond to postal needs. The Service argues that the district court's interpretation of the Act is therefore inconsistent with Congressional intention.

As our discussion has revealed, we do not believe that, despite Congressional and public desire for increased efficiency in the postal service, the specific and plain provisions of the rate and classification sections can be ignored. Accordingly, we are not impressed with the Postal Service's argument that the mandate given to it to "plan, develop, promote, and provide adequate and efficient postal services," 39 U.S.C. § 403(a), supersedes and overrides the specific responsibilities imposed in the first instance upon the Rate Commission and thereafter upon the Governors to determine the rates and classifications which are components of the "postal services" which the Postal Service is to provide.

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and classifications applicable to certain users of the Postal Service have in fact been changed, we find it both conceptually and linguistically bizarre to say that although certain postal rates and classifications have been changed, there has not been a change in the rates or classification of postage.

455 F.Supp. at 865.

The general powers provision of 39 U.S.C. § 401 (10)[12] may well vest the Postal Service with authority to conduct marketplace experiments.[13] Assuming *arguendo* the existence of such authority, we are nevertheless constrained to reject the Postal Service's interpretation of a general grant of power as authorizing activities which necessarily are precluded by other sections of the Act (§§ 3622-23) specifically mandating the manner by which rates and mail classifications must be established. "[A] general powers provision like section [401(10) here at issue] may not ordinarily override a specific provision such as section [s 403(a) 404(a)(2) and Chapter 36 as here]." *National Association of Greeting Card Publishers* v. *United States Postal Service, supra,* 186 U.S.App.D.C. at 358, 569 F.2d at 597. Thus, any power the Postal Service may have to engage in marketplace experiments may not be exercised so as to permit the Postal Service to impose rates or establish mail classifications absent compliance with Chap-

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[12] The Postal Service shall "have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers."

[13] Contrary to the suggestion of the dissent (*see* n.9, p. 1378), the issue of whether the Postal Service has statutory power to engage in marketplace experiments with Rate Commission approval is not before us. It was not raised in the district court, nor was it addressed or briefed on appeal. Under these circumstances we do not deem it apropriate to discuss or resolve that issue.

ter 36 of the Act, 39 U.S.C. §§ 3601 *et seq.*[14]

Supplementing its "flexibility" and "control" argument, the Postal Service additionally argues that requiring submission of test plans to the Rate Commission is unduly burdensome. We do not here hold that all "test plans" must be submitted to the Rate Commission (*see e.g.* Part III B, *supra*, p. [18a]). We do hold, however, that any proposal which would effect a change in mail classification or a rate, including a test or experiment embodying those features, must be submitted to the Rate Commission, no matter how experimental, temporary, or limited in scope the change. As to the burdensomeness of such submissions, we observe that the Rate Commission in 39 C.F.R. § 3001.54(s) [1978] has provided that:

> The Commission may, upon the filing of a proper motion by the Postal Service, together with a showing of good cause therefor, waive certain of the filing requirements of paragraphs (b)-(r) of this section if in the Commission's judgment it has been demonstrated that the proposed change in a rate or rates of postage and a fee or fees for postal services does not sig-

[14] The district court, while recognizing the legitimacy of the Postal Service's argument, nevertheless expressed its disagreement with the Postal Service's conclusion by stating:

> The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom. . . . Thus, although requiring that the Postal Service go to the Postal Rate Commission with marketplace experiments might impede one congressional purpose, it would promote another.

455 F.Supp. at 869.

> nificantly change the then effective rates and fees or alter the cost-revenue relationships of the various classes and types of postal services.

Thus the Rate Commission itself has provided a measure of relief from the burdens hypothesized by the Postal Service and of which it complains.[15] Moreover, if indeed the Postal Service conceives that it is truly burdened by our construction of the Act, it should address that concern to the Congress, for in the present context we do no more than enforce the Congressional command.[16]

V

Although the Postal Service advances other additional arguments all of which are predicated on its interpretation of the Act, we do not find that those arguments merit discussion. One final contention, though, does warrant our response. The Postal Service contends that we should accord great deference to its interpretation of the Postal Reorganization Act.

[15] This regulation has never been challenged and hence we express no opinion as to its validity.

[16] The dissent is unable to point to any authority, statute or legislative history supporting its contention that Congress intended to bypass or override the rate and classification mandates of §§ 3622-23 when they impact upon the managerial functions assigned to the Postal Service. Indeed the dissent acknowledges that the Act and its legislative history are silent in this respect. The dissent premises its entire argument on Congressional efforts to increase the efficiency of the Service, evidenced by Congress giving the Postal Service full management authority (Dissent, pp. [34a-36a])—an argument which not even the Postal Service emphasized to any great extent.

Our more basic difference with the dissent, however, is our belief that the concerns expressed by the dissent are more

In doing so, we of course would thereby be obliged to accept the construction placed upon the Act by the Postal Service, including the various definitional arguments which we have previously rejected.

This same contention was made in *National Association of Greeting Card Publishers* v. *United States Postal Service, supra,* 186 U.S.App.D.C. at 357 n.110, 569 F.2d at 596 n.110. The court there declined to defer to the Postal Service's interpretation on two grounds. In the first instance the D.C. Circuit found the Postal Service's "construction too 'curious' and 'narrow' to prevail over a commonsense reading of the statute," an observation equally appropriate here, and one with which we are in accord. Second, it was recognized there, as we do here, that the agency entitled to deference in the interpretation of 39 U.S.C. §§ 3622-24 is the Rate Commission—not the Postal Service—as it is the Rate Commission which is charged with making recommended decisions on

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appropriate for legislative rather than judicial consideration and action. Our function as jurists is to require compliance with those statutes enacted by Congress. In this case it is not for us to substitute our view of postal policy for the legislation which has been passed by Congress. Certainly Congress is free to modify its enactments so as to accommodate the considerations suggested by the dissent and in fact, we might applaud such legislative adjustments if made. Failing their enactment by Congress, however, and recognizing that Congress has explicitly required all rate and classification changes *without exception* to be submitted to the Commission, we do not think it is our function to rewrite the Act, or at a minimum, to create a legislative exception where none is intimated.

changes in rates and mail classification.

Both of these reasons are sufficient grounds for rejecting the Postal Service's contentions regarding judicial deference to administrative interpretations.

VI

Thus, by giving the common and ordinary meaning to the relevant terms of §§ 3622-23, it is apparent that the parcel post test plan at issue here involved changes in the rates of postage and classification of mail. This being so, it was incumbent on the Postal Service to resort to the Rate Commission as mandated by §§ 3622-23. It did not do so. As a result, the district court under date of July 19, 1978 enjoined the Postal Service from continuing in operation the Service Test Plan until such time as it has complied with the provisions of 39 U.S.C. §§ 3622-25.

Having concluded that the district court did not err, we will affirm the July 19, 1978 order.

A. LEON HIGGINBOTHAM, Jr., Circuit Judge, dissenting.

I.

Competition, experimentation and creative business policies designed to better serve the consumer are highly valued in American society. The traditional folklore has been that one beats his competition by "building a better mousetrap," or, in the context of this case, by providing better delivery services. The majority rejects these traditional values—so they say, because of a statutory mandate. Thus, we have the

paradox of the United Parcel Service (UPS) one of the United States Postal Service's (Postal Service) major competitors, preventing the Postal Service from undertaking on its own a modest and limited experiment which is a relatively small threat, if any, to the plaintiffs, involving no more than twenty selected shippers in no more than five metropolitan areas. As I view the applicable statutes, the Postal Service need not be shackled and prevented from pursuing such modest experimentation. It has some latitude to experiment, without indulging in further bureaucratic processes, and to determine whether a plan can be devised to provide the American public with better service and its major competitor with more robust competition. The learned trial judge below, in his customarily thorough fashion, noted that "as a matter of pure policy the result advocated by the Postal Service is more desirable." *United Parcel Service* v. *United States Postal Service*, 455 F.Supp. 857, 863 (E.D. Pa. 1976). However, he and the majority have concluded that the statute precludes even the modest experiment proposed by the Postal Service in this case. I agree that the result advocated by the Postal Service is far more desirable. But, I disagree with the majority, and the court below, because their decision, from my view, makes no sense when considered against the relevant legislative history. Thus, I dissent.

II.

As the majority's opinion observes, the Postal Service and the Postal Rate Commission (Commission)

were established under the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101-5605 (the Act), which created a new and comprehensive scheme for the management of the nation's postal system,[1] so that the nation's mail could be handled more efficiently and with less expense.

Acting in accord with this Congressional design, the Postal Service has attempted to undertake a very small and temporary experiment in order to develop a new technique to deliver parcel post more efficiently. The experiment was to involve only twenty shippers in five metropolitan areas, who were to handle about 907,000 items of mail. Defendant's Brief Before Dist. Ct., Exhibits 1(A)-1(R). When compared with the approximately 92.2 billion items of mail and 387 million items of parcel post that the Postal Service processed in 1977, the limited nature of this experiment is self-evident. Department of Commerce, Statistical Abstract of the United States 585, 587 (1978); Joint Appendix, at 29.

In this appeal we are presented with the questions of how Congress intended for the new postal management to modernize the postal system and where Congress placed the responsibility of supervising rate and classification experiments.

In order to decipher the Congressional scheme and resolve this question, the Act and its extensive legis-

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[1] The Act also established a fourteen member Postal Service Advisory Council to advise the Postal Service on "all aspects of postal operations." 39 U.S.C. § 206. The role of the Advisory Council is not raised in this appeal.

lative materials must be reviewed. I am convinced that a review of the legislative materials in their totality is especially important here where the legislation was designed to effect a comprehensive reorganization.

The majority focuses on the language of sections 3622 and 3623 [2] and urges that these provisions place the responsibility for supervising rate and classification experiments in the hands of the Rate Commission. To be sure, the challenged experiment involves a "change" in the way the limited number of program participants send their parcel post. It is also evident that the "rates" and "classifications" used in this experiment are different from those normally applied to the Postal Service's customers. However, it is not self-evident whether the temporary and small-scale "changes" which occur as a result of an experiment are the "changes" Congress was referring to when it drafted these sections of the Act. The decision to make a national or permanent rate or classification change is a management decision of a different quality from a decision to undertake an experiment. At the very least, different criteria of evaluation may be used and different results may flow from the decision. Therefore, before these sections are read to cover experiments it is necessary to unravel the management scheme Congress envisioned.

The majority does so by analyzing whether the ordinary, plain, dictionary, or regulatory definitions

[2] *See* Majority opinion, *supra*, at nn. 4 & 5 for text of statutes.

of the words "rates," "classifications" and "change" are to be used. In doing so, the majority misses the essential question: Whether these sections were intended to give the Commission the responsibility of supervising rate and classification experiments. As Learned Hand said:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945) *quoted in*, *United States* v. *Cerilli*, 603 F.2d 415, 429 (3d Cir. 1979) (Aldisert, J., dissenting). Arguably Congress might have intended for sections 3622 and 3623 to cover experiments, although they make no reference to experiments. The majority argues that the absence of such a reference supports their view of the Act. It seems equally plausible to me that it indicates a possible limitation on the scope of the Commission's authority. The ease with which contrary arguments can be made about the importance of the absence of a single word in the statute strengthens my conviction that resort to the legislative history is essential.

In this case, our inquiry into Congressional intent is made difficult by the fact that the legislative materials are also silent about rate and classification

experiments. However, we are obliged to find an answer and therefore must resort to materials from which the Congressional intent can only be inferred.

III.

A.

After reviewing the Act in its entirety and its legislative history, I am convinced that Congress intended to permit the Postal Service to undertake rate and classification experiments and that it did not intend for the Postal Service to seek Commission approval before it undertook such an experiment. I reach this conclusion because of the overwhelming evidence contained in the legislative history that shows that Congress went to considerable effort to give the Postal Service full management authority. Congress wished to strip away and not create layers of managerial control so that new and more efficient modes of operation could be developed and could become a part of our nation's postal system. Commission review of experiments would be inconsistent with that Congressional purpose. Moreover, I have found nothing in the legislative materials that shows that Commission review was nevertheless intended. Indeed, the references to the Commission contained in both the Act and the legislative history show that the Commission was established and structured so it might address concerns that are not implicated in the experimentation process.

B.

In this case, as in many others, the legislative history is ambiguous in many regards. But arising above all ambiguity is the Congressional conviction that the Postal Service should be more efficient, utilizing modern managerial techniques rather than sinking further into its maelstrom and that the Postal Service should have, in most instances, full authority to undertake that effort.

The Congressional debates, reports, and the other legislative materials are replete with references to the inefficiencies of the pre-1970 postal system. For example, the House Report stated:

> For several years there has been a growing awareness . . . that our vast sprawling postal complex is heavily overburdened and in deep trouble. Delays, breakdowns, errors, damage, and other inconvenience to the public have become more and more frequent.

H. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970) *reprinted in* [1970] U.S. Code Cong. & Admin. News 3652 [hereinafter H. Rep.] *See also* S. Rep. No. 91-912, 91st Cong., 2d Sess. 2 (1970) [hereinafter Sen. Rep.]; Remarks of Rep. Dulski, 116 Cong. Rec. 19844 (June 16, 1970); *Towards Postal Excellence the Report of The President's Commission on Postal Organization* 1-14 (1968) [hereinafter President's Commission].

These materials are also replete with references that show that Congress believed these deficiencies were caused by ineffective management, which in turn resulted primarily from a lack of managerial flexi-

bility and freedom and from a lack of centralized control. For example, the Senate Report which accompanied the Senate version of the Act stated:

> [T]he Postmaster General is blocked or undercut at every turn by a labyrinth of postal statutes echoing every postal concern, interest, or whim expressed by Congress over a 200 year period . . . leaving the Postmaster General bound in his own house. Twist and turn as he may, he cannot function in the public interest as a responsible manager.

Sen. Rep., *supra*, at 2.

The House report stated:

> It has now become apparent that all the shortcomings of The Post Office Department are bound up in the fact that responsibility for managing the system is shared by a number of executive agencies and by several congressional committees.

H. Rep., *supra*, at 3653. *See also* President's Commission, *supra*, at 33-43.

The Act was designed to correct this problem. New and more efficient systems were to be developed. The new managers would

> create a lasting foundation for a modern, dynamic, and viable postal institution that is equipped and empowered at all times to satisfy the postal requirements of the future.

H. Rep., *supra*, at 3650.

And the Postal Service was to have major responsibility for the development of those new systems. The House Report stated:

> The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States.

H. Rep., *supra*, at 3657. The Act itself provides that the Postal Service "shall plan, develop, promote, and provide adequate and efficient postal services." 39 U.S.C. § 403.

Further, it is evident that Congress felt that modernization could be accomplished only if the Postal Service was provided broad authority to undertake its duties.

The House Report stated that the Act was designed to

> [e]liminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personal policies that are outmoded, unnecessary, and inconsistent with the modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service.

H.Rep., *supra*, at 3650. It also stated:

> [T]he only solution to these problems is fundamental reform that puts complete responsibility in a single place, with appropriate safeguards against abuse of that responsibility.

Id. at 3653.

The Senate agreed. Its report stated:

> [The Act] is not a halfway measure. Its objective is to establish a postal structure and a

> method of operating that will entrust the management of the U.S. Postal Service, within broad policy guidelines designed to protect the ordinary mailer, to responsible public officials.

Sen. Rep., *supra*, at 3.

Thus modernization and managerial freedom were prime Congressional objectives.

C.

It is also evident that Congress anticipated that rates and classifications would be changed as a result of the development of more efficient systems and that the Postal Service would be involved in that process.

The interrelationship between rates and classifications changes and the modernization of postal services was discussed in the House Report which stated:

> Since the Postal Service will be required to provide postal services "at reasonable and equitable rates and fees," massive and far-reaching improvement in postal efficiency must be achieved before a self-supporting Postal Service becomes a reality.

H.Rep., *supra*, at 3665.

Ample evidence is available to show that Congress intended for the Postal Service to be involved with rate and classification changes.

Most dramatic is the fact that the Act very explicitly states that the Postal Service and not the Commission has the final authority to set rates and classifications. The Act provides:

> Upon receiving a recommended decision from the Postal Rate Commission, the Governors [of the Postal Service] may approve, allow under protest, reject, or modify that decision. 39 U.S.C. § 3625.[3]

Moreover, there is evidence that shows that Congress intended for the Postal Service to provide the Commission with information so that the Commission could make decisions about rate and classification changes.

For example, one of Congress's concerns about the pre-1970 rate-making process was that costs attributable to a particular class of mail were often not charged to that class of mail. Under the Act, each class of mail was to bear its own costs. 39 U.S.C. § 3622. While perhaps a simple theory, it was anticipated that implementation of this mandate would be difficult because, under the accounting system used by the Post Office Department, costs could not readily be attributed to a particular class of mail. President's Commission, *supra*, at 132-35. The Postal Service was thus empowered and given a Congressional mandate to develop an accounting system that permitted cost attribution so rates could be accurately set. 39 U.S.C. §§ 2008, 2009, 2401. *See Association of American Publishers* v. *Governors of U.S. Postal Service*, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973).

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[3] The full text provides that in the event that the Postal Service wishes to reject or modify a decision, the Postal Service must resubmit its request and if still dissatisfied it may modify or reject the decision if it is inconsistent with the Act or if it will produce insufficient revenues.

I therefore disagree with the Court of Appeals for the District of Columbia, which implied in language the majority quotes, that rates and classifications were Commission business and that the Postal Service was to have nothing to do with those matters.[4] *National Association of Greeting Card Publishers* v. *United States Postal Service*, 186 U.S.App.D.C. 331, 569 F.2d 470 (1976), *vacated in part*, 434 U.S. 884, 98 S.Ct. 253, 54 L.Ed.2d 169 (1977). The Act does not provide for such a sharp delineation of duties. Indeed, the majority concedes that the Postal Service has an independent role to play in rate and classification making when it recognizes the right of the Postal Service to develop, plan and implement a "test plan" that would provide information that would be used by the Commission. Majority's opinion, *supra*, at [18a].[5]

It is against this backdrop of Congressional concern that the responsibility for experimentation should be evaluated. Alone, it would support the

[4] I do not mean to suggest by this point that the Commission does not have substantial and dominant authority in the area of rate and classification making. My point is simply that Congress intended for the Postal Service to have a significant involvement in this process, especially with regard to the development of data to be considered by the Commission.

[5] The majority has reserved for another day the question of whether the Postal Service may conduct, even with Commission approval, marketplace experiments. However, the majority does not seem disturbed by the Postal Service's involvement in rates and classifications; it is merely the type of involvement it questions.

Postal Service's authority to engage in the rate and classification experiment challenged by the UPS, an experiment which was designed to develop data on new techniques for the handling of parcel post and the effect of different rates and classifications.

D.

The majority argues that regardless of this history, the existence of the Commission demonstrates a Congressional intent to restrict the power of the Postal Service to undertake experiments. I do not agree. It is my belief that the legislative materials discussed above compel any court to exercise caution before it decides that Congress intended to place a restraint on the Postal Service's management authority. Indeed, I believe that this history, which demonstrates an overwhelming concern with deregulation, almost compels us to hold that management flexibility exists, unless contrary evidence is provided. Cf. *United Telegraph Workers* v. *F.C.C.*, 141 U.S.App.D.C. 190, 194, 436 F.2d 920, 924 (1972) ("This expression of congressional desire that the Commission encourage technological innovation requires us to demand a compelling showing of legislative prohibition before we strike down an experiment . . . which is designed to furnish the information input that makes such innovation possible.").

It is my view that the legislative materials do not provide the evidence necessary to reject the presumption of flexibility and to hold that Congress intended to have the Commission supervise experiments. More-

over, these materials provide positive support for my conclusion that supervision of experiments was not one of the duties envisioned for the Commission.

As I note above, the descriptions of the Commission's responsibilities contained in the legislative documents are somewhat lacking as they contain no reference to rate and classification experiments. However, read in their totality they suggest that the Commission was given the responsibility of setting national policy on rates and classifications and acting as an overseer to ensure that these policies were properly implemented. *See* H.Rep., *supra*, at 3666, 3667-68, 3692-95 and Sen.Rep., *supra*, at 13-17. To be sure, at times this responsibility would include the supervision of permanent rate or classification changes that would have a limited impact, for example, a subsidized rate for sending a particular type of periodical. However, the duty to supervise these changes is derived from the broader duties. In the case of an experiment, such as the one challenged here, whose object is the testing of new systems of handling mail, these broader duties are not implicated. This suggests that the duty to supervise experiments was not included among the Commission's responsibilities.

Sections 3622 and 3623 also make no reference to rate and classification experiments. Again, read in their totality they give us some assistance. For example, the statutes outline a specific process which the Commission must follow when it makes rate and classification decisions. Section 3624 further provides that the Commission can approve a request by the

Postal Service only after an opportunity for a hearing conducted pursuant to the Administrative Procedure Act has been granted.[6] This process is simply not a productive one when a managerial decision as to the necessity for the development of data on a system change is being made. Moreover, the information that would be necessary to have a meaningful hearing on the desirability of the change would not be available until the experiment is conducted. Cf. *Delta Airlines* v. *CAB*, 147 U.S.App.D.C. 272, 276, 455 F.2d 1340, 1344 (1971) ("The CAB in reality is not able to investigate without testing how this experimental tariff actually works.") and *American Airlines* v. *CAB*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 *cert. denied*, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed. 73, 17 L.Ed.2d 75 (1966) ("A month of experience will be worth a year of hearings.").

In addition, I envision that during the process of an experiment the Postal Service might wish to modify some portion of the experimental design on rates or classifications. Under the majority's reading of the statute, hearings would be necessary. I cannot believe Congress intended so absurb a result. For

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[6] 39 U.S.C. § 3624 provides:

> (a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interests of the general public.

example, during the course of the experiment challenged here the Postal Service might decide that packages were falling in different weight groups than originally anticipated and may wish to change the weight classifications in the experiment. It would simply make no sense to have a hearing to make the modification.

Another indication that Congress did not intend to have the Commission review experiments is also found in sections 3622 and 3623. These provisions, section 3622(b) and section 3623(c), state that the Commission's decisions are to be made in accordance with the policies of the Act and with a number of itemized factors.[7] These factors, which include factors such as the relative value of the kind of mail transmitted and the effect of rate increases upon the general public are not generally applicable to experiments. *E.g.*, 39 U.S.C. § 3622(b)(4) and § 3623(c)(2). Moreover, some of the factors involve cost evaluations that cannot be made before an experiment is complete. 39 U.S.C. & 3622(b)(5) & (6).

Finally, an examination of the reasons that were given to support the Commission's creation leads me to conclude that the Commission was not designed to supervise experiments. These reasons are, for the most part, relevant only when major policy decisions are made, when the integrity of the Postal Service could be threatened, or when one of the Act's under-

[7] *See* Majority opinion, *supra*, at [9a-11a] n.4, & n.5 for the text of the statute.

lying purposes could be frustrated. These are not concerns which arise during an experiment.

First, many members of Congress were concerned that while they wanted the Postal Service to operate as an efficient business enterprise, they were concerned that the

> Postal Service in fact and shall be operated as a service to the American people, not as a business enterprise, designed to provide excellent postal service.

Sen.Rep., *supra*, at 4.

It was felt that the Commission would be able to strike the necessary balance, and would ensure that postal rates reflected not only management objectives but also served broader public purposes, e.g., certain nonprofit organizations might be given special rates. These broader public purposes are not implicated by an experiment.

A second impetus for the establishment of the Commission was the sentiment that some distance from the day-to-day operations of the Postal Service might be necessary to make sound business decisions on rates. *See* Majority's Opinion, *supra*, at [6a-8a]. Again an experiment would not tamper with this concern, and would, if anything, permit the Postal Service to give the Commission information it needs to perform this function.

Congress was also concerned about the impact political pressure had had on rate and classification determinations. Under the reorganization, Congress wished to design a system that would be as free from

political influence as possible, where experts could make decisions based on the technical problems of running the postal system and not the effectiveness of particular lobbyists. *See, e.g.*, Remarks, Sen. McGee, 116 Cong. Rec. 26955 (1970).

The Commission was seen as a solution to this problem. The House report stated:

> The Commission provides an invaluable buffer between the management of the Postal Service and the possible influence of partisan politics. Insulation from partisan politics is one of the principal purposes to be served.

H.Rep., *supra*, at 3660.

It is conceivable that partisan politics could influence the Postal Service's decision to select particular participants in an experiment which used cheaper rates. But there is no showing of partisan politics in the pleadings or the stipulated facts in this case. To the contrary, it is clear that this "Local Parcel Service Test Plan" was created for managerial purposes.[8]

[8] The Postal Service outline of the experiment indicates the following:

Test Objectives

A. The first objective is to determine the feasibility of the new operations configuration affecting:

1. Acceptance procedures.

2. Local Holdout and BMC processing.

3. MVS operations.

B. The second objective is to determine the costs associated with reduced handlings which result from the new operations configuration.

[Footnote continued on page 47a]

The authority to undertake limited and temporary experiments does not permit the return to the days when every interest group imaginable had special permanent rates established for them. Moreover, political influence on the decision to undertake an experiment or to choose a participant is simply not as dangerous as on decisions where national policy is made.

In our zeal to protect the public we must remember that the public is not always protected by more regulation and more supervision. That is the overwhelming message of the Postal Reorganization Act. Indeed, in this case, the effort to impose regulation upon the Postal Service and to require it to seek Commission review is spearheaded not by a representative of

[8] [Continued]

C. The third objective is to determine the service and cost impact on the mailer and to measure mailer acceptance of this impact.

D. The fourth objective is to analyze the service within the context of our continuing review of the structure of traditional services. Issues to be explored are:

1. Whether nearer Parcel Post zones are in need of an adjustment?

2. Whether volume requirements for Bulk Parcel Post are in need of adjustment?

3. Whether pick-up (not plant load) offered as an option or offered as a feature (no option) of the service is needed?

4. Whether further refinements are needed in the single piece third class and zone-rated, fourth class classifications and rate design?

the general public but by one of the Postal Service's major competitors, the United Parcel Service.

The majority rejects the present plan because it hypothesizes that the authority to approve an experiment for twenty shippers in five metropolitan areas "would permit unregulated changes in rates and mail classification at *any* time and under *any* circumstance whereby less than all members of the public were entitled to benefits stemming from such changes." Majority Opinion, *supra*, at [17a-18a]. This "logic" is the worst example of the parade of horribles. If the Postal Service, under the rubric of experimentation, attempted to set up permanent or specialized rates for any individual or group presumably a court would not be misled by a label marked "experiment." Moreover, if the Postal Service abused the limited authority that I believe Congress intended for it to have, the Commission has the power under 39 U.S.C. § 3662 to review and prohibit Postal Service actions that circumvent the policies of the Act.

One final point raised by the majority. I believe 39 U.S.C. § 403, which proscribes the "unreasonable discrimination" "preferences," provides no assistance in resolving the question in this appeal. Majority's Opinion, *supra*, at [18a]. First, any experiment will discriminate against other users of the postal system whether or not the Commission approves it. And second, the section only prevents "unreasonable discrimination." A properly conducted marketplace experiment is certainly not an "unreasonable" type of "discrimination" or "preference."

IV.

I believe the experiments are a permissible exercise of Postal Service authority. I do not believe, as the majority concludes, that the Congress, in its attempt to free the postal system of constraints so that it might operate as a modern and efficient enterprise, intended to require the Postal Service to undertake the time-consuming process of hearings and Commission review in order to develop and provide data for the Commission's rate-making judgments.

One of the nation's leading scholars on administrative law, Dean James O. Freedman, in his classic treatise, *Crisis and Legitimacy: The Administrative Process and the American Government*, 261-62 (1978), has stressed:

> The legitimacy of the administrative process cannot turn, then, upon its non-conformity to a simplistic version . . . . Rather, it must be tested pragmatically, by the responsiveness of administrative institutions to the most fundamental principles of a democratic society and by the degree to which administrative institutions meet the nations highest aspirations for justice and effective government.

Unfortunately in this case, despite the Congressional dream and design to bring flexibility, creativity and managerial efficiency to the Postal Service, the public's aspirations have once again been dashed. The

public has been precluded from having within the Postal Service "justice and effective government."

I therefore dissent.[9]

[9] The majority has decided this appeal without determining whether the Postal Service has the authority to undertake the experiment even if it seeks Commission approval. At oral argument the Postal Service indicated that it still had an interest in conducting this specific experiment. As a result of the majority's decision, the Postal Service will have to submit the proposed experiment to the Commission and participate in hearings with the possibility that it will be determined after a second challenge, a second decision by a district court and a second appeal to this court, that the Postal Service cannot undertake marketplace experiments even with Commission approval. (I would of course disagree with that conclusion). I believe this would be a waste of the resources of the Postal Service, the Commission and the judiciary. The majority should reach this issue.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2390

UNITED PARCEL SERVICE, INC.,
a New York Corporation,

and

UNITED PARCEL SERVICE, INC., an Ohio Corporation

vs.

UNITED STATES POSTAL SERVICE, APPELLANT

(D.C. Civil No. 77-3620)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Present: GARTH and HIGGINBOTHAM, *Circuit Judges*
and SCHWARTZ,* *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 26, 1979.

* Honorable Murray M. Schwartz, United States District Judge for the District of Delaware, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 19, 1978, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

August 7, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Filed October 9, 1979]

No. 78-2390

UNITED PARCEL SERVICE, INC.,
a New York Corporation,

and

UNITED PARCEL SERVICE, INC., an Ohio Corporation

v.

UNITED STATES POSTAL SERVICE, APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*, and SCHWARTZ, *District Judge*

The petition for rehearing filed by United States Postal Service, *Appellant* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc,

the petition for rehearing is denied. Judge Higginbotham would grant the petition for rehearing.

BY THE COURT:

/s/ Garth
Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 77-3620

UNITED PARCEL SERVICE, INC.,
a New York Corporation

and

UNITED PARCEL SERVICE, INC., an Ohio Corporation

v.

UNITED STATES POSTAL SERVICE

July 19, 1978

OPINION AND ORDER

EDWARD R. BECKER, District Judge.

I. *Preliminary Statement*

This case raises the question whether the United States Postal Service may, without notice, hearing, or prior submission to the Postal Rate Commission, conduct limited and temporary experiments in which proposed new mail classifications, offered at heretofore unavailable rates, are tested in the marketplace or, conversely, whether the institution of such experimental postal services is subject to the procedures governing changes in permanent rates and classifica-

tions.[1] The question appears to be one of first impression.

The United States Postal Service and the postal procedures at issue in the case at bar find their common genesis in the Postal Reorganization Act of 1970, Pub.L. 91-375, 84 Stat. 719 (codified at 39 U.S.C. §§ 101-5605) [hereinafter "Act"]. Passage of the Act signalled a major change in the structure and accountability of the postal bureaucracy. Critics of the Post Office Department claimed that the Post Office was at once over-political and under-efficient, *see generally* H.R.Rep. No. 91-1104, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Admin. News, pp. 3649, 3651-54, 3660-61; S.Rep. No. 91-912, 91st Cong., 2d Sess. 1-3 (1970); President's Commission on Postal Organization, Towards Postal Excellence (1968) and that the Postmaster General was generally powerless to take the kind of extensive remedial action necessary to affect significantly the Department's all too apparent ills, *see* S.Rep., *supra*, at 3.[2]

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[1] Postal rates and mail classifications are distinct concepts in the statutory scheme. 39 U.S.C. §§ 3622 & 3623.

[2] Illustrative of this problem is the following exchange in 1967 between then-Postmaster General Lawrence O'Brien and the Chairman of the House Post Office Appropriations Subcommittee:

> MR. STEED: General . . . would this be a fair summary: that at the present time, as the manager of the Post Office Department, you have no control over your workload, you have no control over the pay rates of the employees that you employ, you have very little control over the conditions of the service of these employees, you have virtually no control, by the nature of it, of your physical facilities, and you have only a limited control, at best, over the transportation facilities that you are compelled to use—all of which adds up to a staggering amount of "no control" in terms of the duties you have to perform.
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> MR. O'BRIEN: Mr. Chairman, I would have to generally agree with your premise. . . . that is a staggering list of "no control." I don't know [whether] it has ever been put that succinctly to me. If it had been at an appropriate time, perhaps I wouldn't be sitting here.

H.R.Rep. 91-912, 91st Cong., 2d Sess. 3 (1970).

Congressional response to these postal maladies was far-reaching. The Post Office was taken out of the Cabinet and established as the United States Postal Service, an independent unit of the executive branch. 39 U.S.C. § 201. Under the new system, the Postmaster General is no longer appointed by the President; rather, the President appoints the nine Governors of the Postal Service, no more than five of whom may be from the same political party. The Governors, who serve for rotating nine year terms, appoint the Postmaster General and Deputy Postmaster General and set the latters' tenure and compensation; the Governors and their two appointees become the Board of Governors of the Postal Service. *Id.* § 202.

The Postal Reorganization Act gives to the Postal Service increased control of and responsibility for postal operations and management, free of the formal and direct supervision of the legislative and executive branches. Thus, the Postal Service is empowered to sue and be sued in its own name, to adopt rules and

regulations, to enter into and perform contracts, to keep its own system of accounts, to acquire and dispose of property, etc. *Id.* § 401. To professionalize and depoliticize the Postal Service even further, a postal career service was established, *id.* § 1001(a), provision was made for hiring executives, *id.* § 1001 (c), and otherwise upgrading postal management, *id.* § 1004, and political recommendations on personnel matters were prohibited, *id.* § 1002. As to employee-management matters, collective bargaining was made applicable to postal service employees, with provision for binding arbitration in the event of lack of agreement, *id.* §§ 1202-1207, and postal employees were granted the right to work, *id.* § 1209(c).

Reform in the area of setting postal rates and classes was at least as thoroughgoing as the other reforms just referred to. Congress abandoned the business of postal rate-making and established a quasi-regulatory agency, the bipartisan Postal Rate Commission. The Commission, which is independent of the Postal Service and the members of which serve for rotating six year terms, was given primary responsibility for overseeing changes in postal rates, classes, and services. *Id.* §§ 3601-3604. Although the Governors of the Postal Service are charged with the establishment of fair and equitable classes of mail and postal rates and fees, *id.* § 3621, before instituting such rates or classes the Post Service must request recommended decisions from the Postal Rate Commission, *id.* §§ 3622 & 3623. The Commission is to hold evidentiary hearings under 5 U.S.C. §§ 556

& 557 (Administrative Procedure Act) pursuant to regulations that it may establish, 39 U.S.C. § 3624, to evaluate the proposed rates or classes of mail according to criteria established by Congress, *id.* §§ 3622 & 3623. Upon receiving the recommended decision of the Commission, the Governors of the Postal Service may approve, allow under protest, reject, or modify the decision in accordance with specific statutory provisions. *Id.* § 3625. If no decision is forthcoming from the Commission within a specified period of time, the Postal Service may, upon ten days notice in the Federal Register, establish temporary changes in rates or classes in accordance with the proposed changes under consideration by the Commission. *Id.* § 3641.[3] Proposed changes in the nature of postal services that will generally affect service on a nation-

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[3] Section 3641 of the Act, providing for temporary changes in rates and classes of mail, permits the Postal Service to institute a temporary *rate* if the Postal Rate Commission fails to transmit a recommended decision in accordance with § 3624(c). 39 U.S.C. § 3641(a). Section 3624(c) requires the Commission to transmit its recommended decision within ten months after receiving the request for such a decision from the Postal Service, except that if the Commission's failure to comply is caused by the Postal Service's delay in responding to any lawful order of the Commission, the ten month period is extended by the time of the Postal Service's noncompliance. The temporary rate instituted under § 3641 is to be in accordance with the rate proposal under consideration by the Commission, *id.* § 3641(c), and must terminate no later than 150 days after the Commission renders its recommended decision, *id.* § 3641(d). Section 3641(e) permits the Postal Service to institute a temporary change in mail *classification* if a recommended decision is not forthcoming from the Commission within 90 days of submission of a request by the Postal Service. Such a temporary classifica-

wide or substantially nationwide basis must also be submitted to the Commission for hearing and an advisory opinion before such changes may be instituted. *Id.* § 3661.

Responding to its congressional mandate to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees," *id.* § 403(a), in mid-October of 1977 the Postal Service instituted an experimental parcel delivery service that is scheduled to last approximately twelve months. Under this test program, which is not available to the public generally, about twenty selected shippers [4] in five metropolitan areas [5] entered into service agree-

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tion change must be in accordance with the proposal made to the Commission and must terminate no later than 30 days after the Commission transmits its recommended decision.

The procedures for temporary rate changes were established as stated above in 1976 by Pub.L. 94-421, 90 Stat. 1303 (1976). The original 1970 Act had permitted temporary rate increases to go into effect 90 days after submission to the Commission, but such increases were not to exceed 33% of the existing permanent rates. Further, they expired 30 days after the Commission rendered its decision. There was no statutory provision requiring the Commission to render a decision within a specified period of time. Temporary classification changes were unaffected by the 1976 amendment.

[4] Shippers were selected from among the Postal Service's regular parcel post patrons whose mailing patterns made them likely prospects for the service represented by the test plan.

[5] The metropolitan areas involved are: Seattle, Washington; Dallas-Fort Worth, Texas; Omaha, Nebraska; Boston, Massachusetts; and Washington, D.C. One test participant is in fact located in Baltimore, Maryland, but, in accordance with past practice, mails its parcels at the Washington, D.C. Bulk Mail Center.

ments with the Postal Service. These agreements provide that parcels mailed by the test participants, when suitably packaged for bulk mail processing,[6] will be assessed postage based upon the average weight of such packages. For example—and subject to the distance limitations set out in note 7 *infra*—regardless of the actual weight of any given package, if the average weight of the pieces tendered, based on sample weighings, is five pounds or less, postage for each parcel is $.87; if the average weight of the packages is more than five but not more than twenty pounds, postage for each parcel is $1.15. These charges are significantly less than the generally available parcel post rates of the Postal Service. Further, the postage charges under the test program do not, for the most part, vary with distance, as they do under regular parcel post.[7] Participants in the pro-

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[6] The Postal Service's Bulk Mail System came into full operation in 1976 in an effort to automate and expedite the mailing of parcels. It consists of 21 Bulk Mail Centers and 9 auxiliary facilities. As a result, postal operations involving parcel post and third-class parcels are now organized around the Bulk Mail System facilities, rather than around standard post offices and the general mail network. Packages mailed through the Bulk Mail System must meet certain packaging, size, weight, shape, and content restrictions. Basically, these limitations seek to ensure that the packages are "machineable" by standardizing to some extent parcels mailed through the System. A minimum of 300 pieces per mailing must be tendered in order to qualify for bulk parcel post. Rates are based on the average weight per piece of all parcels in the mailing and vary with distance.

[7] Distance is limited to the extent that the delivery destination of the parcel cannot be outside the geographic area covered by the Postal Service Bulk Mail Facility that serves

gram must provide a minimum volume of 50 pieces per mailing and 250 pieces per week. They also must present all parcels to the Postal Service in containers and cooperate with the Postal Service in data collection and research activities.[8]

The plaintiffs, large nationwide providers of parcel delivery services that compete with the Postal Service's parcel post program and that would suffer adverse competitive impact were the current Postal

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the shipper. Thus, the Boston Bulk Mail Center service area is Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, and a part of upper New York; packages mailed from Boston as part of the test plan are limited to that area. As a further example, the Dallas-Fort Worth Bulk Mail Center service area is most of Texas and parts of Louisiana, Arkansas, Oklahoma, and Kansas.

Within such service areas, which cover five parcel post zones—a local zone and four numbered zones—a five-pound package mailed under normal parcel post would cost from $.91 to $1.36, depending on distance; under the test plan, paskages averaging five pounds would each cost $.87, regardless of distance within the service area. Similarly, a twenty-pound package would regularly cost anywhere from $1.58 to $2.93; the test plan standardizes the cost at $1.15. Comparable rates for parcels shipped via plaintiff United Parcel vary by distance from $1.05 to $1.28 for five-pound parcels and from $2.10 to $3.02 for twenty-pound packages.

A further limitation on distance under the current plan is that regardless of the size of the service area, no more than 25% of the test volume may be delivered beyond parcel post zone number two, which is approximately 150 miles from the parcel's point of origin.

[8] As an additional aspect of the test, a service feature known as Day Certain Delivery, not being generally promoted by the Postal Service during the experiment, is being promoted to the shippers participating in the test.

Service test instituted on a permanent and system-wide basis,[9] contend that the Postal Service's experiment is in violation of the policy and procedures established by the Postal Reorganization Act. Although the particular experiment at issue in this case poses a relatively small threat to plaintiffs, *see* notes 9 *supra* & 11 *infra*, the plaintiffs fear that other less restricted experiments will be deleterious. Choosing to strike before significant harm is done rather than after, they attack the precedent of marketplace experiment sans Rate Commission approval which the Service Test Plan establishes. The primary focus of this attack on the Service Test Plan is grounded on the procedures mandated by 39 U.S.C. §§ 3622-3624 for rate and mail classification changes.[10] Plaintiffs

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[9] Although plaintiffs, the United Parcel Service companies, now have only limited contract carrier rights to deliver parcels for designated retail stores, U.P.S. currently has a proposal before the Interstate Commerce Commission that, if approved, would grant U.P.S. the unlimited right to deliver for retail stores as a common carrier. N.T., Dec. 30, 1977, at 9. The service presaged by the Postal Service's experiment would also be aimed in large measure at retailers. *See* Stipulated Exhibits 4, 5. The test itself however, has relatively little competitive impact on U.P.S. since distance of delivery and participant limitations have been imposed on the experiment by stipulation of the parties. *See* N.T., Nov. 21, 1977, at 3-4, 5.

[10] Plaintiffs originally asserted that the Postal Service's experiment violates both the mandate of 39 U.S.C. § 403(c) that "[i]n providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not . . . make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user" and the require-

contend that, insofar as the test takes place in the marketplace, because the rates charged to participants in the experiment are previously unavailable rates and because the plan represents a new class of mail, the Postal Service is required to submit the plan to the Postal Rate Commission and await the Commission's recommended decision before instituting the test. Plaintiffs argue that the Postal Service may not lawfully circumvent the statutorily required procedures for postal rate and classification changes merely by unilaterally denominating the changes "experimental." Since the statutory procedures, which contain no exceptions for market "experiments," were not followed, plaintiffs argue that the Service Test Plan should be enjoined.[11]

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ment of § 3661 that any service change "which will generally affect service on a nationwide or substantially nationwide basis" must be submitted to the Postal Rate Commission for an advisory opinion before it is instituted. In briefing and argument, however, plaintiffs placed primary emphasis on the argument based on §§ 3622 & 3623. Because of our disposition of the latter argument, we need not address plaintiffs' alternative contentions.

[11] The complaint was filed on October 20, 1977, and a motion for preliminary injunction was filed on October 28. A hearing on the motion was scheduled for November 21. On that date, but prior to the scheduled hearing, plaintiffs and defendant entered into a stipulation restricting the scope of the test. *See* note 9 *supra*. As part of that stipulation, plaintiffs withdrew their motion for a preliminary injunction. On the scheduled trial date of December 30, 1977, a stipulation of facts was moved into evidence and the matter was submitted on final hearing as a case stated.

The Postal Service rejoins that, although the procedures cited by plaintiffs would indeed be applicable if the Service Test Plan were instituted on a permanent and system-wide basis, those procedures are not triggered where, as here, a reasonable, limited, and temporary experiment is conducted as a research and development activity pursuant to the Postal Service's duty to "plan [and] develop . . . adequate and efficient postal services." 39 U.S.C. § 403(a). The experiment, the Postal Service maintains, is designed to assist the Service in determining what, if any, rate and/or classification changes it should make in order to better utilize the Bulk Mail System, and is not itself such a change.

For reasons that will at length appear, although we believe that as a matter of pure policy the result advocated by the Postal Service is more desirable, construction of the statute compels the conclusion that the plaintiffs must prevail and that continution of the "experimental" parcel delivery service at issue must be enjoined.

II. *Discussion*

A. *The Statutory Language; Some General Principles of Statutory Construction and the Principle of "Plain Meaning"*

We begin our inquiry by focusing on the statutory language that governs the Postal Service's submission of changes in rates and classifications to the Postal Rate Commission. Section 3622(a) of the Postal Reorganization Act provides:

> From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

39 U.S.C. § 3622(a). Similarly, the next section provides:

> Following the establishment of [an initial] mail classification schedule . . . the Postal Service may from time to time request that the Commission submit, or the Commission may submit to the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

Id. § 3623(b).

Our objective as we seek to determine the meaning to be given this statutory language is, of course, to give effect to the congressional intent. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975). We think it reasonable to assume that in expressing its intent through the Postal Reorganization Act, Congress sought clarity rather than obfuscation and, unless the contrary appears, that Congress therefore used statutory words in their ordinary and usual sense and with the meaning commonly attributed to them. *Caminetti* v. *United States*, 242 U.S. 470, 485-86, 37 S.Ct. 192, 61 L.Ed. 442 (1917);

Institute for Scientific Information, Inc. v. *United States Postal Service*, 555 F.2d 128, 131 (3d Cir. 1977).

Reading the statute according to this general principle, there does not on the surface appear to be anything inherently difficult or ambiguous about the language involved. The common meaning of a "rate of postage" is simply the fee the Postal Service charges for processing, transporting, and delivering a particular type of mail. Similarly, the ordinary understanding of a mail classification is nothing more complex than a grouping of mail based on established and shared criteria. *See National Retired Teachers Ass'n* v. *United States Postal Service*, 430 F.Supp. 141, 146 (D.D.C. 1977). The usual interpretation of "change" is alteration or making different. Although the Postal Service argues vigorously that, in the context of Postal Rate Commission supervision, "changes" in "rates of postage" and "mail classifications" signifies only permanent and system-wide rate and classification changes rather than the limited experimental adjustments in rates and classifications at issue in the instant case, the statute itself does not at any point set out or specifically allude to any exceptions to the general scheme,[12] nor do the particular provisions on

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[12] There is provision for temporary rates and classes in 39 U.S.C. 3641, *see* note 2 *supra* & accompanying text, but such temporary changes are not exceptions from the requirement that rate and classification changes be filed with the Postal Rate Commission. Temporary rates and classes are permitted when changes, *already filed* with the Postal Rate Commission, are not acted upon within statutorily prescribed time periods.

which we have focused expressly limit their applicability to changes of a nationwide, systemwide, or permanent scope. On the face of the statute, therefore, there appears no reason to restrict the ordinary and usual scope of the statutory terms, which, we think, would generally be read to include any change in rates or classifications.

Turning our attention to the particular actions of the Postal Service that are challenged in this case, there can be no doubt that the Postal Service's experiment does involve rates of postage and classifications of mail within the ordinary meaning of those terms. Fees are being paid to the Postal Service to transport and deliver a certain type of mail that is grouped according to established and shared criteria. Indeed, as we have already observed, the Postal Service concedes that the very changes at issue would have to be submitted to the Postal Rate Commission pursuant to §§ 3622 and 3623 were these innovations permanent and systemwide. Further, it is clear that as to the twenty participants in the Service Test Plan, postal rates and mail classifications have in fact been changed, for the participating shippers now mail their packages under previously unavailable rates as part of a previously nonexistent class of mail. So stated, where the "experiment" does not consist of mock packages mailed at hypothetical rates but instead requires the payment of real postage by real shippers for real parcel post service, there have been changes, however limited, in rates of postage and classifications of mail that affect these shippers and that fall within a "plain meaning" reading of the statutory language.

There is a possible counterpoint to our "plain meaning" analysis, which can be constructed by analogy to 39 U.S.C. § 3661;[13] that is, by comparing, in the postal context, rate, classification, and service changes.[14] When one thinks of a rate or classification change, the argument goes, one naturally tends to think in systemwide terms; *i.e.*, when one thinks of a change in the rates, for example, of parcel post, it is the more "common" understanding that such a change would be across the board, and not a change affecting only twenty mailers and only for a predetermined length of time. The "common" or "ordinary" conception of a classification change might be said to be similar. In the case of a *service* change, however, the argument continues, one might more naturally think in less sweeping terms. To be sure, a service change could be systemwide. But it commonly also could be purely local—for example, the decision to discontinue home delivery in a single town when the mailboxes are moved farther away from the curb. *Grover City* v. *United States Postal Service*, 391 F.Supp. 982 (C.D.Cal. 1975). *See also Bradley* v. *United States Postal Service*, 554 F.2d 186 (5th Cir. 1977) (decision to discontinue door-to-

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[13] Under § 3661, Postal Rate Commission involvement in service changes is triggered only when the Postal Service plans "a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis." 39 U.S.C. § 3661. *See generally* Part II.B.4 *infra*.

[14] This argument is hinted at by the Postal Service in its brief, though not clearly articulated.

door delivery in one town not a service change of nationwide or substantially nationwide scope); *Martin* v. *Sloan*, 432 F.Supp. 616 W.D.N.C. 1977) (consolidation of two rural postal routes not a service change of nationwide or substantially nationwide scope). Thus, in § 3661 Congress had to modify the ambiguous "plain meaning" of a "service change" to make it clear that Postal Rate Commission involvement was to be only in the broader, systemwide situation. Under this theory, no such modification of the plain meaning of rate or classification changes was necessary in § 3622 or § 3623 because the ordinary usage of such terms already includes a "systemwide" component, but modification *would* have been necessary to expand Rate Commission jurisdiction to the less-than-systemwide situation. The argument concludes that the plain meaning reflects, consistent with § 3661, a congressional desire to reserve Rate Commission review of the "big" case.

The effect of the foregoing argument, if successful, would be to reverse the presumption under which we otherwise would be laboring. For if the "plain meaning" of the statute is as we initially articulate it, it is incumbent on the Postal Service to demonstrate that imputing such a meaning to the words of the Act would be unreasonable in terms of the Act's purpose and structure. *See* discussion *infra*. If, however, the "plain meaning" is as the Postal Service posits it to be, the presumption reverses and it becomes the burden of the plaintiff to show unreasonableness.

Although the Postal Service's argument has some appeal, we ultimately are unconvinced by it. There is nothing "plainer" than the fact that postal rates and classifications have been changed as to the participants in the Service Test Plan. When the rates and classifications applicable to certain users of the Postal Service have in fact been changed, we find it both conceptually and linguistically bizarre to say that although certain postal rates and classifications have been changed, there has not been a change in the rates or classification of postage. We do not say that such a statutory definition is impossible; the ultimate length of this opinion is testimony to its possibility. We *do*, however, say that it strains "plain meaning" to impose such a definition on the language as a presumptive matter.

Moreover, this argument ultimately hinges on the assumption that Congress wanted the approach to rate, classification, and service changes to be identical vis-á-vis Rate Commission involvement. Congress' linguistically different treatment of the different kinds of changes, however, may well indicate that the changes were thought of in different categories because, for example, of the different areas of expertise of the Postal Service (Service Management) and the Postal Rate Commission (ratemaking). *See National Association of Greeting Card Publishers* v. *United States Postal Service*, 186 U.S.App.D.C. 331, 358, 569 F.2d 570, 597 (1976) [hereinafter "NAGCP"]. Thus, comparing rate changes and service changes is like comparing apples and oranges. Even without drawing an inference adverse to the

Postal Service from § 3661, we therefore are unable to employ § 3661 to provide a restrictive gloss on the facially comprehensive language of §§ 3622 and 3623.

Rather than lowering the curtain on our inquiry into the meaning of the statute, however, we think that the foregoing actually only sets the stage for further analysis. Although it is received wisdom that when a statute's plain meaning is clear "the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion," *Caminetti* v. *United States*, *supra*, 242 U.S. at 485, 37 S.Ct. at 194, it is also an endorsed caveat to this rule that "[w]hether or not the words of a statute are clear is itself not always clear." *Barbee* v. *United States*, 392 F.2d 532, 535 n.4 (5th Cir. 1968). Thus, what might appear to be the plain meaning must yield if it is inequitable, unreasonable in context, or manifestly contrary to the statutory purpose or legislative intent. *See, e.g., Center for National Policy on Race and Urban Issues* v. *Weinberger*, 163 U.S.App. D.C. 368, 372, 502 F.2d 370, 374 (1974). Our goal, after all, is to vindicate Congress' intent, and we therefore must read statutory language as Congress used it—which may or may not be precisely as Webster defined it. In order to determine whether the "plain meaning" of a particular provision is in fact unreasonable in light of the totality of the statute, the statutory purpose, or the legislative intent, a court must in the first instance engage in at least some measure of further statutory analysis. *See* 2A

Sands, Statutes and Statutory Construction §§ 46.02.04 (4th ed.) Additionally, since the terms with which we are concerned are used in the Postal Reorganization Act against the particular background of regulatory activity, and, indeed, against the even more particular background of postal regulatory activity, we must discern whether such contexts imparted to the operative terms some modifying quasi-technical meaning at variance with the terms' "plain meaning." *NLRB* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 76 S.Ct. 383, 100 L.Ed. 285 (1956); *Barber* v. *Gonzales*, 347 U.S. 637, 74 S. Ct. 822, 98 L.Ed. 1009 (1954).

Thus, the "plain meaning" of the statutory language raises no more than a presumption, which may be rebutted, as to the true "statutory meaning" of that language. The meaning of a federal statute is for the federal courts to decide. *Enochs* v. *Smith*, 359 F.2d 924, (5th Cir. 1966). When a court is faced with a situation in which Congress could "reasonably" have meant two different things, *i. e.* when one expressed statutory purpose might lead to one interpretation but a different clear purpose leads to another, and when on its own terms the statute makes a coherent whole whichever of two ways particular provisions are interpreted, a more complicated situation is present. But, in such a case, we must remember: (1) that we are a court, not a legislature, and are charged with interpreting the words that Congress used, not with choosing them; and (2) though our own normative preference might be otherwise, if the plain and ordinary meaning of the lan-

guage is itself reasonable in light of the broad purposes of the statute and in light of the structure and context of the legislation as a whole, we must uphold that meaning. *Arkansas Valley Industries, Inc.* v. *Freeman*, 415 F.2d 713 (8th Cir. 1969); *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 131 U.S.App.D.C. 246, 404 F.2d 824 (1968).

Our modus procedendi in pursuing the further statutory analysis which is necessary will be to analyze a number of considerations asserted by the Postal Service to militate against application of the "plain meaning principle." *First*, we shall consider the Postal Service's research and development role and the congressional goal of managerial flexibility. *Second*, we shall address the possible analogy to research and development provisions of other federal regulating schemes. *Third*, we shall consider the alleged cumbersomeness and futility of APA type hearings and the alleged unsuitability of the statutory criteria governing evaluations of rate changes to experimental rates (and the question whether these are parameters of congressional intent contra subjecting experimental rates and classifications to Postal Rate Commission review). *Fourth*, we shall further explore the Service's argument based on 39 U.S.C. § 3661. As will be seen, when all is said and done, the plain meaning principle will survive the assault.

B. *Considerations Alleged to Militate Against the Application of the Plain Meaning Principle*

1. *The Postal Service's Research and Development Role and the Goal of Managerial Flexibility.*

The argument most vigorously pressed by the Postal Service against an inclusive reading of the statutory jurisdiction of the Postal Rate Commission—and the one that is apparently at the core of the Service's position—is based on § 403(a) of the Act. This section makes it the responsibility of the Postal Service to plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a). When coupled with § 401(10), which provides that the Postal Service shall "have all . . . powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers," the Postal Service contends that the duty to "plan, develop, promote, and provide" efficient postal services means that the Service has the authority to conduct marketplace experiments like the Service Test Plan.

In support of its position, the Postal Service cites to the history of the Post Office in general and of the Postal Reorganization Act in particular. The Service points especially to the explicitly articulated congressional purpose of permitting—indeed mandating—increased managerial initiative and flexibility. *See, e. g., Buchanan* v. *United States Postal Service*, 508 F.2d 259, 263 (5th Cir. 1975). Thus, the Senate Report accompanying the Act found it "obvious" that

"postal management must now be given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service." S.Rep. No. 91-912, 91st Cong., 2d Sess. 2 (1970). The Postal Service argues that "unfettered authority and freedom" to experiment with new rates and new classes of mail is essential to fulfilling this congressional expectation. Without experimentation, it is said, the Service would risk either operational stagnation or premature implementation on a systemwide scale of innovations that might turn out to be counterproductive or, at least, not trouble-free. The Postal Service reminds us that the old Post Office was considered to have been deficient in the degree to which it engaged in service experimentation, *see* President's Commission on Postal Organization, Towards Postal Excellence 37 (1968) ("[N]o service experimentation program [currently] exists. As a result, though the service ideal is deeply imbedded in postal employees, they serve a market whose needs are but dimly perceived."), and that Congress clearly intended that the new Postal Service would remedy this shortcoming, *see* H.R.Rep. 91-1104, 91st Cong., 2d Sess. 9, *reprinted in* [1970] U.S.Code Cong. & Admin.News pp. 3649, 3657 ("The Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States.").

Furthermore, argues the Postal Service, even under the predecessor provisions of § 403(a) in the old postal legislation, *e. g.*, Pub.L. No.. 86-682, 74 Stat. 578 (1960), which was replaced by the Postal Reorganization Act, the Post Office was permitted to engage in marketplace experiments. Thus, the old § 504(a) of Title 39 of the United States Code provided:

> The Postmaster General shall maintain in the Department a research and development program, including investigations and studies, for the purpose of introducing or improving equipment, supplies, methods, procedures, means, and devices used in the Department in order that its business may be more efficiently and economically operated.

In *United Telegraph Workers* v. *FCC*, 141 U.S. App.D.C. 190, 436, F.2d 920 (1970) the D.C. Circuit upheld the Post Office's participation, jointly with Western Union, in the Mailgram experiment. Mailgram was conceived of as a hybrid of the traditional telegram and first-class mail, between the two in speed and cost. The experimental service was to be available to Western Union subscribers in 12 selected cities for a test period of two years. It was projected that the subscribers would be able to send messages through Western Union communications network to one of the 110 post offices nationwide that would have teleprinters installed. Postal workers were to scan the printed messages for completeness and legibility and then insert them in win-

dow envelopes for placement in ordinary first class mail. The Post Office charged Western Union a handling fee; postage was the normal first-class rate.

In finding that § 504(a) of the postal statute permitted the Post Office's participation in the experiment, the D.C. Circuit relied on its earlier decision in *Atchison, T. & S. F. Ry.* v. *Summerfield*, 97 U.S.App.D.C. 203, 229 F.2d 777 (1955), *cert. denied*, 351 U.S. 926, 76 S.Ct. 779, 100 L.Ed. 1456 (1956). In *Summerfield*, the Postmaster General had instituted an experiment whereby ordinary first-class mail was to be carried by air on a space available basis, without payment of additional airmail postage. In all other respects (*e. g.*, handling and distribution) the first-class mail procedures were unchanged. The district court recognized the Post Office's power to experiment, but held that the experiment was unduly prolonged and so not a true experiment. 128 F.Supp. 266, 274 (D.D.C.1955). The D.C. Circuit reversed, stating that "we are unable to find any prohibition of the present experimental program, while we do find statutory provisions broad enough to encompass it within their terms." 97 U.S. App.D.C. at 208, 229 F.2d at 782. However, the statutory provisions to which the *Summerfield* court referred included apparent approval of the experiment by the Congress in an appropriations bill, Act of May 28, 1954, 68 Stat. 144, 148, *see* S.Rep. No. 1286, 83d Cong., 2d Sess. (1954), and the Postmaster General's authority to provide for the transportation of the mail, 52 Stat. 1027 (1938). The opinion in fact made no mention

of the Postmaster General's research and development responsibilities under 63 Stat. 608 (1949), which was the direct line ancestor of the old § 504 (a), on which the *United Telegraph Workers* court and the Postal Service here rely.

On the basis of this rather brief history of the Postal Reorganization Act and also of the Postal Service's research and development power, as subsumed within the cited cases, the Service would have us approve the Test Plan as a legitimate exercise of that power. The Service further asserts that requiring submission to the Postal Rate Commission of proposals like the Service Test Plan would thwart the goal of managerial freedom and would impede implementation of a managerially ordered undertaking designed to improve the efficiency of the Postal Service.

The reliance of the defendant Postal Service on cases that antedate the Postal Reorganization Act is misplaced and its evaluation of the Act's legislative history one-sided. For the Act produced broad changes in postal responsibility that went beyond the simple transfer of the responsibilities of Congress to the Postal Rate Commission and the responsibilities of the Post Office to the Postal Service. It is an incomplete characterization of the changes worked by the Act to assert that because the Post Office once took certain actions—*e. g.*, initiation of experimentation—without input from Congress, the Postal Service may now take those actions without input from the Postal Rate Commission. This point was at

issue in *NAGCP, supra.* The Postal Service there asserted that it was authorized under the Postal Reorganization Act to set fees for special services,[15] primarily because it had had the power to set such fees under prior law. The Service also relied on § 404 (a) (6) of the Act, a general power provision that authorizes the Service "to provide, establish, change, or abolish special nonpostal or similar services." Yet, relying on the "plain language" of the new Act, 39 U.S.C. § 3622, and referring to the postal restructuring rendered by that Act, the D.C. Circuit rejected the Postal Services' claim of fee-setting power.

> [Any] reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management, and its authority therefore reasonably extends to basic decisions pertaining to the provision of special, non-postal and other services. The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable, and its authority therefore reasonably extends to all aspects of such decisions, including review of budget estimates, allocation of postal costs, establishment of rates for postage, and, it would seem plainly, the setting of fees for those special services which management decides should be provided.

NAGCP, supra, 186 U.S.App.D.C. at 358, 569 F.2d at 597.

We find the perspective of the *NAGCP* court helpful here, although the specific question that court faced was, of course, much different then the one before us. The elaborate divisions of responsibility between Congress and the Post Office that had evolved over decades of congressional regulation gave way in the Postal Reorganization Act to a more predictable and principled division of responsibility. Management was vested in the Postal Service, rate and classification supervision in the Postal Rate Commission. We recognize and weigh heavily the congressional goal of greater managerial flexibility, but also recognize another congressional purpose that finds its incarnation in the Postal Rate Commission. The Commission's existence insures that an agency independent of the Postal Service will provide for public notice and hearing—input of those affected by the proposed action—and full and on the record, *see* 39 U.S.C. § 3624(a), consideration of pertinent factors

[15] The services in question included: (1) the furnishing of mail list corrections; (2) the privilege of prepayment of postage without stamps; (3) the forwarding or returning of undeliverable mail; (4) the registry of mail; (5) the insurance of mail; (6) the provision of COD mail; (7) the certification of mail; (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender; (9) special delivery; (10) the special handling of mail; (11) the provision of money orders. *See* 40 Fed.Reg. 43233-34 (Sept. 19, 1975).

and congressionally imposed goals before certain types of decision are made.

> The bill provides that the Postal Rate Commission shall be a body fully independent of the Board of Governors and fully independent of any influence whatsoever of the Postmaster General or of members of his staff. The Commission's independence is contemplated as being complete from the other arms of the postal service, subject to no subordination within the postal service either expressed or implied. The limited circumstances under which a recommended rate decision made by the Commission may be modified by the Governors are carefully spelled out in the language of the bill.

S.Rep., *Supra*, at 13. Congress was, after all, relinquishing the bulk of its control over the post office and it had to be sure that legitimate public interests were protected, for it would no longer be able to provide that assurance itself. Thus, the Postal Rate Commission, in addition to providing expertise on the subject of ratemaking, also was designed as a sort of sunshine mechanism to avoid undue political influence and to assure that the public is heard from and the public interest represented before rate, classification, and significant service changes are made.

It is ineluctable that the power of the Postal Rate Commission and the power of the Postal Service will intersect at some point. At that point the interests served by management freedom and public exposure and input come into potential conflict, for whenever by operation of the statute the Postal Rate Commis-

sion is interposed between the Postal Service's decision that a rate increase is needed and the implementation of that rate increase, managerial autonomy is in some measure limited. Reference to older cases like *Summerfield* and *United Telegraph Workers* is thus suspect, because there was no such thing as the Postal Rate Commission when these cases were decided. The policies and purposes represented by the Commission thus were not factors in those cases. Without that critical element in their calculus, the precedential value of those cases is sharply limited. The very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom. Moreover, at least some of the factors that, when a permanent rate increase is proposed, come into play and energize the involvement of the Postal Rate Commission would also appear to be relevant when the issue is marketplace experimentation—*e.g.*, possible managerial favoritism, political or otherwise, avoidable and harsh impact on that part of the private sector that competes with the Postal Service, etc. Thus, although requiring that the Postal Service go to the Postal Rate Commission with marketplace experiments might impede one congressional purpose, it would promote another.

Mere invocation of the need for and purpose of managerial discretion in experimentation, therefore, cannot prevail, for Congress has unmistakably put limits on that discretion. We are inclined, as a normative matter, to agree with the Postal Service that the point of limitation on managerial discretion

should not be reached at the point of implementation of the Service Test Plan. A limited experimental change is not likely to have the same impact on the public as a whole or even one segment of the public (*e. g.* parcel shippers) that a permanent systemwide change would have. Our task, however, is by reference to the Act, to locate the limits on managerial discretion and not, by reference to our own preferences, to create them.

The Postal Service would resolve the tension between the dual purposes of managerial discretion to experiment and public interest supervision of rates by saying that when a rate change is experimental, it is no longer a rate change for purposes of Commission review. Plaintiffs, on the other hand, argue that when an experiment involves a rate change it is no longer an experiment for purposes of unreviewed managerial discretion. The question, under the Act, is on which side of the line between experiment and rate this hybrid called an experimental rate belongs for purposes of Commission review.

The Postal Service's position in effect gives statutory primacy to § 403, which articulates the Service's duty to plan, develop, promote, and provide postal services. It is this section that most embodies the principles of management's authority to experiment, and the Postal Service reads it to mean that when rate or classification changes are still in the planning or developmental stage, even if such changes have been made experimentally, Rate Commission involvement is not required under the Act. We observe in

this regard that § 504(a) of the old title 39, the research and development provision on which, together with its antecedents, the *United Telegraph Workers* (and putatively the *Summerfield* court, *but see* discussion of *Summerfield supra*) relied to uphold marketplace experimentation, was specifically rescinded by the Postal Reorganization Act. *See* H.R. Rep. 91-1104, 91st Cong., 2nd Sess., *reprinted in* [1970] U.S.Code Cong. & Admin.News pp. 3649, 3697. Thus, although the general subject matter of the new § 403(a) and the old § 504(a) overlap to some extent, § 504(a)'s apparent grant of authority to conduct marketplace experiments cannot be said to have survived the change, for § 504(a) itself did not.

Furthermore, even if we were to assume that *United Telegraph Workers* and *Summerfield* somehow survived the repeal of the statutory authorization for marketplace experimentation on which they relied, it is at least arguable that those older cases did not involve rate or classification matters at all, which is the particular focus of this litigation, but rather dealt with service changes. The Postal Service apparently so concedes, at least as to the *Summerfield* type of experiment. *See* Reply of the United States Postal Service to Plaintiffs' Trial Memorandum 5. Service charges are now governed by 39 U.S.C. § 3661, and Rate Commission involvement in such changes is explicitly restricted to cases of meaningful impact on a nationwide or substantially na-

tionwide scale. No such restrictions appear in §§ 3622 and 3623. *See Buchanan* v. *United States Postal Service*, 508 F.2d 259 (5th Cir. 1975); text accompanying notes 24-25 *infra*.

The Postal Service's argument, then, can only be that the general responsibility to plan, develop, promote, and provide postal services by itself imposes a limitation on Rate Commission jurisdiction to review rate and classification changes that is not apparent from the sections that establish that jurisdiction—§§ 3622 and 3623. The ordinary rule of statutory construction, however, is that a general duties provision like § 403(a) may not override specific provisions like §§ 3622 and 3623. *NAGCP*, *supra*, 186 U.S.App.D.C. at 358, 569 F.2d at 597. Indeed, the Act itself demonstrates that § 403(a) does not operate as a brake on Commission jurisdiction for, as we have noted, the duty imposed by § 403(a) to *provide* postal services is clearly subject to Commission jurisdiction under §§ 3622 and 3623 *if* providing the services involves rate or classification changes. Otherwise, the comprehensive and elaborate ratemaking and classification scheme set out in the Act would be meaningless.

The Postal Service does not seem to quarrel with the proposition that *providing* services, at changed rates and classifications, implicates Commission review. Yet the Service offers no convincing explanation why, under the Service's reading of § 403(a), the duty to provide postal services is subject to Commission jurisdiction while the duties to plan, develop,

and promote postal services are not. Moreover, we are hard-pressed to understand why, as to the participants in the Service Test Plan, services are not in fact being *provided* at changed rates and under a new classification. It may be that the services are being provided on an experimental basis, but, once again, the Act does not on its face exclude experiments from Commission jurisdiction. In the absence of such an exclusion, internally consistent application of the terms of the Act demands that when rates or classifications are implicated in the marketplace, Commission review under §§ 3622 and 3623 is triggered.[16]

2. *Analogy to Research and Development Provisions of Other Federal Regulatory Schemes*

At the conclusion of the final hearing, we invited the parties to augment their original briefs with in depth analysis of the teachings of the cases dealing with other federal regulatory systems. They have done so, though with equivocal results.

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[16] We observe that, even under this reading of the statute, Commission jurisdiction over what we have termed "marketplace experiments" would not entail such jurisdiction over *all* experiments. The Postal Service would remain free unilaterally to engage in whatever experimentation it saw fit so long as the experiment did not impact upon the actual rate someone paid for his or her postal service. Dummy packages could be mailed to test sorting machines, costs of processing, efficiency of operations, etc. Market surveys could be taken to determine shipper receptivity to proposed new services. None of these things would raise the spectre of Rate Commission interference with management's institution or conduct of experiments.

Looking beyond the perimeters of the Postal Reorganization Act, the Postal Service argues that the more general regulatory context imposes a gloss on the statutory terminology that alters what we have characterized as the "plain meaning" of the rate sections of the statute. The Service cites cases involving the Federal Communications Commission, the Civil Aeronautics Board, and the Interstate Commerce Commission. *See Network Project* v. *FCC*, 167 U.S. App.D.C. 220, 511 F.2d 786 (1975); *Saturn Airways, Inc.* v. *CAB*, 157 U.S.App.D.C. 281, 483 F.2d 1284 (1971); *Delta Air Lines, Inc.* v. *CAB*, 147 U.S. App.D.C. 272, 455 F.2d 1340 (1971); *United Telegraph Workers* v. *FCC*, 141 U.S.App.D.C. 190, 436 F.2d 920 (1970); *Comm. Against Pay TV* v. *FCC*, 112 U.S.App.D.C. 248, 301 F.2d 835, *cert. denied*, 371 U.S. 816, 83 S.Ct. 28, 9 L.Ed.2d 57 (1962); *General Increases—Eastern Central Territory*, 316 I.C.C. 467 (1962); *River Terminals Corp. Class and Commodity Rates*, 14 M.C.C. 542 (1939).[17] The Postal Service reads these cases to stand for the proposition that when federal agencies have research and development responsibilities, the agencies will be upheld in the reasonable exercise of those responsibilities, even

[17] Defendant also cites *American Airlines* v. *CAB*, 123 U.S. App.D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966). *American Airlines*, however, involved rulemaking authority rather than individual tariff or service review, and therefore is not as relevant to the case at bar as are the cases noted in the text. In any case, to the extent *American Airlines* is relevant, its analysis adds nothing of significance to that which is offered by the other cases.

when that exercise takes place in the marketplace. Since the Postal Service has such a responsibility under 39 U.S.C. § 403(a), and since the experiment at issue is demonstrably reasonable, the conclusion urged upon us is that on the strength of the cited cases we should uphold this reasonable marketplace exercise of postal research and development.

Curiously, plaintiffs cite the very same case to support *their* position. They maintain that reference to the general regulatory framework as represented by these cases establishes that in the ordinary regulatory context Congress and the courts understand general regulatory ratemaking authority to include authority over experimental rates charged to members of the public. Therefore, urge the plaintiffs, any "technical" connotations assumed by the Postal Reorganization Act's ratemaking language by virtue of prior usage in the regulatory context militate in favor of the statute's "plain meaning," not against it.

The fact that both parties cited the same cases to support opposite conclusions raises initial suspicions about the degree to which the cases might be dispositive in this litigation. Upon consideration of the citations, we do not think that the cases are particularly helpful to either side, although they may offer some small measure of support for plaintiffs. We will not set out and analyze each of the cited cases, for they are sufficiently similar in general legal analysis and conclusions to warrant treatment by example. We therefore will address directly only *United Telegraph Workers* v. *FCC*, *supra*, which is,

on its facts, perhaps the closest to the instant case of the cases cited. Our comments, however, are, unless otherwise indicated, generally applicable to these cases as a whole.

United Telegraph Workers was the Mailgram case. Western Union, before instituting the program filed with the FCC a tariff for the experiment. The tariff was approved without hearing. In reviewing the FCC's decision, a critical issue before the D.C. Court of Appeals was "whether approval of experimental Mailgram is beyond the Commission's authority." 141 U.S.App.D.C. at 193, 436 F.2d at 923. Answering this question in the negative, the court did not mention the generalized FCC authority over rates for common carrier services offered to the public, although the general requirement that new tariffs be filed with the agency, *see* 47 U.S.C. §§ 203-204, was apparently the reason the issue was before the FCC in the first place, 141 U.S.App.D.C. at 191, 436 F.2d at 921. Rather, the court cited broad agency responsibility to provide for a rapid and efficient communications system, 47 U.S.C. § 151, wide agency discretion and authority in effectuating its responsibilities, *id.* § 154(i), and the agency's duty to keep itself informed "as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States," *id.* § 218.

The Postal Service reads all this to mean that just as the FCC could authorize and supervise reasonable

experiments, so too can the Postal Service. Even assuming, however, the reasonableness of the postal experiment at issue in the case sub judice, the Postal Service's argument is fatally flawed in analogizing the Postal Service to the FCC and other agencies of that genre. Such agencies are *regulatory* agencies, whereas the Postal Service is, under the supervision Postal Rate Commission, analogous to a *regulated* agency. It is true, as the Postal Service points out, that like the FCC, the CAB, or the ICC, the "regulated" in this case—the Postal Service—is an independent agency within the executive branch of the federal government, whereas the regulated entity in the cited cases were members of private industry. This governmental/private enterprise configuration, however, is hardly sufficient to justify inverting the regulatory roles. Whatever responsibilities for research and development agencies like the FCC possess, those duties are cast in the larger context of a supervision by the regulator of marketplace experimentation by the regulated. The attempt of the Postal Service to analogize the power of the regulator in *United Telegraph Workers* to the asserted power of the regulated in this case ignores this larger context, and so must fail.

United Parcel Service, of course, analogizes the FCC in *United Telegraph Workers* to the Postal Rate Commission rather than to the Postal Service. Proceeding from this analogical starting point, plaintiffs draw from *United Telegraph Workers* and the cases of which it is representative the lesson that regulatory authority to supervise ratemaking in general

includes the authority to supervise experimental ratemaking in particular. Otherwise put, plaintiffs contend that the case teaches that when circumstances are such that the regulated would have to go to the agency for approval of permanent rate or service changes, the regulated must also do so when the proposed change is experimental in nature, and that as a general rule a regulatory agency's jurisdiction does not depend on whether the proposal of the regulated entity is for permanent or for experimental tariffs. If this were not the case, say the plaintiffs, the Western Union experimenters would not have felt compelled to go to the FCC in the first place, but instead, like the Postal Service in the instant case, would have resolutely proceeded without so much as a nod to the regulatory agency.

As we earlier observed, the *United Telegraph Workers* opinion did not specifically address the discrete question of the general scope of FCC authority over rates; that is, it did not speak of the power of rate supervision independently of the FCC's other broad statutory duties and powers. On the face of the court's language, it would appear that the court found FCC "authority" to rule on experimental rates in the FCC's broad development responsibilities. Such a reading of the case, of course, would be of no help to UPS, for the Postal Rate Commission, to which UPS would liken the FCC, has no "development" responsibilities. The responsibilities of the Postal Rate Commission are strictly confined to relatively passive review of rate, classification, and major service

changes, unadorned by the overlay of broad FCC-esque responsibility for industry guidance and of wide discretion in choosing the appropriate manner and means of pursuing its statutory mandate. To the extent that the *United Telegraph Workers* court relied on such broader powers to sustain the FCC's exercise of jurisdiction over experimental rates, its opinion is not applicable to the situation before us.

Plaintiffs recognize the silence of *United Telegraph Workers* on the issue of the reach of unembellished supervisory authority over rates, but, as we read their brief, argue that this silence only indicates that the court *assumed,* without the need for discussion, that FCC jurisdiction over rates in general included FCC jurisdiction over experimental rates. Such jurisdiction is so obvious, the argument runs, that just as Congress saw no need to single such rates out in the Postal Reorganization Act, the *United Telegraph Workers* court saw no need to dwell on the issue of FCC ratemaking authority. Plaintiffs also contend that the court's use of the word "authority" is misleading. When the court purports to find FCC "authority" over the experimental Mailgram tariff in the agency's broad promotion and development responsibilities, we are urged, the court is not, in fact, speaking of authority in a jurisdictional sense. In addressing FCC "authority" under the agency's broad development mandate, UPS submits, the court was not addressing the *existence* of authority—jurisdiction—but the *exercise* of authority—discretion. Thus, the "authority" sections of the opinion are read to mean that

the broad industry-development responsibilities of the FCC gave the agency the discretionary authority to take the particular actions that it did in the procedural manner that it did. Plaintiffs argue that the reason the issue was before the agency in the first place, however—the reason FCC *jurisdiction* was invoked—was that a new, if experimental, tariff was being proposed by a member of the regulated industry. In like manner, urges UPS, Postal Rate Commission jurisdiction—which is mandatory under the Postal Reorganization Act—is implicated when the Postal Service proposes to test a new mail classification by charging new rates in the marketplace.

Plaintiffs reading of the case is certainly not implausible. Indeed, it may be more plausible than the alternative—that the court considered FCC jurisdiction over experimental programs and rates to depend on the agency's broad and developmental statutory responsibilities. It seems to us, however, that the *United Telegraph Workers* court did not analytically compartmentalize the two questions of existence and exercise of authority as discretely as have plaintiffs. Rather, the pervasive regulatory responsibilities of the FCC seem, in the court's approach, to have coalesced to some extent with the agency's jurisdictional boundaries. As a result, although the case probably provides some marginal support for plaintiffs, we do not think that *United Telegraph Workers* bears the weight that United Parcel seeks to put on it. It surely cannot be gainsaid that in *United Telegraph Workers* an agency with general supervisory rate-

making authority was affirmed in its exercise of authority over experimental rates. Nevertheless, we do not read the case to stand unequivocally for the proposition that regulatory jurisdiction over permanent tariffs embraces jurisdiction over experimental tariffs such that when, by statute, a permanent tariff must be filed with the regulatory agency, so too must an experimental tariff be filed.

The other cases cited seem to us to suffer from similar ambiguity in locating the statutory ground in which agency authority over experimental tariffs and services finds root. Even so, plaintiffs argue that the non-FCC cases in their arsenal of citations are stronger support for their position because the mandate to the FCC to secure the benefits of new inventions and developments for communications users, 47 U.S.C. § 218, one of the primary factors upon which the *United Telegraph Workers* court relied, and which also therefore colored the opinions in *Network Project* v. *FCC*, 167 U.S.App.D.C. 220, 511 F.2d 786 (1975) and *Connecticut Comm. Against Pay TV* v. *FCC*, 112 U.S.App.D.C. 248, 301 F.2d 385, *cert. denied*, 371 U.S. 816, 83 S.Ct. 28, 9 L.Ed.2d 57 (1962), does not exist in the statutory charters of the other agencies to which plaintiffs' citations refer us—the CAB and the ICC. Plaintiffs contend that these agencies, insofar as they lack the specific responsibility of promoting and directing experimentation in the regulated industry, provide a much closer parallel to the Postal Rate Commission and that when the exercise of authority over experimental tariffs or services by the

ICC or CAB is upheld, the presumption that control over experimental tariff regulation flows directly from control over general tariff regulation is much stronger.

It is our perception, however, that the FCC, the CAB, the ICC, and other comparable regulatory bodies are really different types of agencies from the Postal Rate Commission. Nor do we think that the difference between them can be distilled in one or two specific provisions of the agencies' statutory charters such that the presence of absence of a particular provision is determinative. A reading of the statutes relevant to agencies like the FCC, CAB, and ICC, 47 U.S.C. § 151 *et seq.* (FCC); 49 U.S.C. § 1301 *et seq.* (CAB); 49 U.S.C. § 1 *et seq.* (ICC), reveals a statutory gestalt according to which the regulatory agency's control over and involvement in the affairs of the regulated industry are much more pervasive and sweeping than are the involvement and control exercised by the Postal Rate Commission. We do not find this difference surprising, for when the regulated industry is essentially private, primary governmental guidance of the industry in order to promote congressionally defined or intimated public policy goals and to develop the industry along paths perceived to be beneficial to the nation as a whole conventionally comes through the regulatory agency. In the case of the Postal Service, however, primary control is exerted directly by Congress, since the Postal Service is essentially a modified government corporation. Developmental goals and instructions could be and were included within the Postal Service's statu-

tory charter, and the mandate to "plan, develop, promote, and provide adequate and efficient postal services," 39 U.S.C. § 403(a), is given directly to the Postal Service.[18]

Investigation, supervision, and review of publically beneficial research and development of new programs and services offered to the public was, at least to some extent, statutorily charged to the regulatory agency in *United Telegraph Workers* and in the other of the cited cases. In the postal context, however, these functions are charged directly to the regulated—the Postal Service—not to the regulator—the Postal Rate Commission. The ultimate issue we face is whether, for purposes of the Postal Reorganization Act's internal jurisdictional structure, experimental rates and classifications are primarily *experiments*, for which the Postal Rate Commission apparently has no primary responsibility, or, conversely, are primarily *rates*, which the Postal Service may not institute without input from the Postal Rate Commission. That is, does the fact that a rate or classification is offered to a limited number of mailers only and is experimental in nature make these things not rates

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[18] Section 403(a) also instructs the Postal Service to perform its duties at fair and reasonable rates and fees. This responsibility is, of course, shared with the Postal Rate Commission. 39 U.S.C. § 3622. But the Postal Rate Commission does not explicitly share in the developmental mandate, except insofar as the necessity for ongoing planning, development, and promotion impacts on what would be "reasonable and equitable and sufficient" rates and fees. *Id.* § 3621. *See id.* § 3622(b).

or classifications within the meaning of the Act? The cases cited by plaintiffs and defendants are of relatively little help in this regard, for in them the courts found situations in which the regulatory agency had at least some significant measure of stated regulatory jurisdiction over *both* marketplace experiments and general rates. In such a situation, it was not necessary to define the scope of authority granted by either of these components in isolation. Insofar as the courts were not presented with regulatory schemes such as the one we confront, we are not surprised that they do not provide unambiguous answers to the questions before us.

Thus, the Postal Service's proposed application of the cases like *United Telegraph Workers*, whereby the Postal Service is analogized to the FCC because they both have research and development powers, suffers from a defect similar to that suffered by plaintiffs' citation of the same cases. Though not an absolute dichotomy, the two responsibilities of supervision of industry development and review of tariffs—both of which are responsibilities of agencies, like the FCC—seem in large measure to be split between the Postal Service and the Postal Rate Commission with research and development primarily the realm of the Postal Service and rate review the initial domain of the Postal Rate Commission. The dissimilarities already noted between the FCC and the Postal Rate Commission thus find their correlates in complementary dissimilarities between the FCC and the Postal Service (these latter dissimilarities being magnified

by the fact that the Postal Service is not a regulatory agency at all). Uncritical application of these cases, in the fashion urged upon us, would put us somewhat in the position of the blind man examining the elephant. The proponents of such an approach err, in that they selectively focus on *part* of the typical regulatory framework and, finding that reflected in *part* of the postal framework, then, depending on the proponent, conclude that either the Postal Service or the Postal Rate Commission is just like the FCC, the CAB, and the ICC. Finding ourselves on too uncertain ground when we attempt to wrench the holdings of the cited cases from their own context and impose them on ours, we decline to do so.

The result dictated by the "plain meaning" principle has thus survived the Postal Service's invocation of the alleged research-development exception and of precedent from other regulatory fields. We turn now to consideration of still another factor alleged by the Postal Service to militate against application of the plain meaning principle, this one emanating from the textual fabric of the Postal Reorganization Act.

3. *The Alleged Cumbersomeness and Futility of APA-Type Hearings and the Alleged Unsuitability of the Statutory Criteria Governing Evaluation of Rate Changes to Experimental Rates (Barometers of the Congressional Intent?)*

The Postal Service's next argument is, in effect, that Congress could not have intended that experimental rates be subjected to Rate Commission review

because of the alleged cumbersomeness and futility of APA-type hearings and the alleged unsuitability to experimental rates of the statutory criteria governing evaluation of rate changes. Before addressing these contentions, we state them more fully.

The Postal Service first argues that, regardless of the general regulatory structure of other agencies, the very provisions that establish and regulate Postal Rate Commission review of rates and classifications, §§ 3622-3624, establish their own inapplicability to experimental rates and classifications. Under 39 U.S.C. § 3624(a), the decisions of the Postal Rate Commission on rate and classification matters may be made only after evidentiary hearings conducted in conformity with the Administrative Procedure Act, 5 U.S.C. §§ 556 & 557. That Act sets out specific criteria that the Commission is to consider in evaluating a proposed rate change, 39 U.S.C. § 3622(b),[19] or

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[19] 39 U.S.C. § 3622(b) provides:

> (b) Upon receiving a request [from the Postal Service for a recommended decision], the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all

classification change, *id.* § 3623(c).[20] The Postal

> other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
>
> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
>
> (7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;
>
> (8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and
>
> (9) such other factors as the Commission deems appropriate.

[20] 39 U.S.C. § 3623(c) provides:

> (c) The Commission shall make a recommended decision on establishing or changing the [mail classification] schedule in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable classification system for all mail;
>
> (2) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classification and services of mail;
>
> (3) the importance of providing classifications with extremely high degrees of reliability and speed of delivery;
>
> (4) the importance of providing classifications which do not require an extremely high degree of reliability and speed of delivery;

[Footnote continued on page 102a]

Service argues that these criteria only make sense in the context of permanent and systemwide rate or classification changes, and make limited experiments unsuitable for Commission review, thereby demonstrating the congressional intent not to subject experiments to the hearing requirements.[21]

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[20] [Continued]

(5) the desirability of special classifications from the point of view of both the user and of the Postal Service; and

(6) such other factors as the Commission may deem appropriate.

[21] The Postal Service expressly declined to argue the point that sections 3621-3628 of the Postal Reorganization Act, which include the review provisions with which we are here concerned, are under a heading which reads: "SUBCHAPTER II—PERMANENT RATES AND CLASSES OF MAIL." In light of Congress' particular instructions in the Public Law version of the Act that "[a]n inference of a legislative construction is not to be drawn by reason of a chapter in Title 39, United States Code, as enacted by Section 2 of this Act, in which a section is placed nor by reason of the caption or catchline," Pub.L. No. 91-375, § 11(b), 84 Stat. 785 (1970), the Postal Service was correct in not making the argument. Divisions made and titled for organizational clarity are not always reliable indicators of substantive intent, and Congress has expressly forbidden us from treading this uncertain path of statutory interpretation. We are aware of the fact that the D.C. Circuit, at least, has referred to the subchapter heading to support the proposition that the affected sections of the Act are for permanent rates only. *Direct Mail Advertising Ass'n, Inc.* v. *United States Postal Service*, 147 U.S.App.D.C. 394, 458 F.2d 813 (1972). Even so, we feel ourselves constrained by § 11(b) of Pub.L. No. 91-375. Furthermore, the D.C. Circuit was only com-

Turning to the cumbersomeness contention, the Postal Service concedes that, despite the presumed

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paring permanent rates under subchapter 2, §§ 3621-3628, with temporary rates under subchapter 3, § 3641. We have already noted the role of temporary rates, which may be instituted if the Postal Rate Commission does not issue a decision in a specified period of time, in the structure of the Postal Reorganization Act. *See* text accompanying note 3 *supra*. The question of where, if at all, experimental rates fit into the statutory scheme was not at issue before that court. *See also Direct Mail/Marketing Ass'n, Inc.* v. *United States Postal Service*, 163 U.S.App.D.C. 157, 501 F.2d 717 (1974); *Association of American Publishers, Inc.* v. *Governors of United States Postal Service*, 157 U.S.App.D.C. 397, 485 F.2d 768 (1973). In each of these cases, although broad statements were made by the courts concerning the scope of subchapter 2, the only issues before the courts were the relative requirements of permanent and temporary (not experimental) rates and the applicability of provisions contained in one subchapter to rates instituted under the other.

We emphasize that although temporary, an experimental rate is not a "Temporary Rate" within the meaning of the Postal Reorganization Act. Temporary rates under the Act are instituted only after the Postal Rate Commission has failed to act on proposed permanent rates that have been filed with it, and may be instituted only under limited and circumscribed conditions and terms. Beyond temporal limitedness, experimental rates and temporary rates have little in common. Temporary rates have standards, safeguards, ceilings, and, since they have been filed with the Postal Rate Commission and in the Federal Register, *see* 39 U.S.C. § 3641, exposure built into the procedures applicable to them. On the other hand, experimental rates, under the Postal Service's reading of the Act, have no such circumscriptions, even though they could have comparable impact on the public or at least segments of it, depending on the scope and duration of the experiment. The sunshine and public interest purposes of the Postal Reorganization Act are thus represented in the temporary rate provision.

management prerogatives of the leaders of private industry, rate supervising agencies often review and rule on proposed marketplace experiments undertaken by the regulated industry. *See* Part II.B.2 *supra*. However, the Service observes that when these other agencies in other regulatory areas rule on marketplace experiments by members of the regulated industry, the agencies generally exercise the option of ruling on the experiment without formal adjudicative proceedings. *See, e. g., Network Project* v. *FCC*, 167 U.S.App.D.C. 220, 511 F.2d 786 (1975); *Saturn Airways, Inc.* v. *CAB*, 157 U.S.App.D.C. 281, 483 F.2d 1284 (1971); *Delta Air Lines, Inc.* v. *CAB*, 147 U.S.App.D.C. 272, 455 F.2d 1340 (1971); *American Airlines Inc.* v. *CAB*, 123 U.S.App.D.C. 310, 359 F.2d 624, *cert. denied*, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966). The Postal Service notes that the Postal Rate Commission is, unlike other agencies, without this discretion to dispense with the requirement of an evidentiary hearing. The Service sees this as an indication that Congress, familiar with the normal procedures, never intended the Postal Rate Commission to get involved in experimental, as opposed to permanent rates. Congress, continues the argument, would not have intended proposed experiments, generally handled on an expedited basis by other agencies, to get bogged down in the mires of evidentiary hearings. Additionally, the Postal Service highlights language in the foregoing cases that suggests that evidentiary hearings are not fruitful where experiments rather than permanent tariffs are at issue. *Network Project* v. *FCC*, 167 U.S.App.

D.C. 220, 230-31, 511 F.2d 786, 796-97 (1975); *Saturn Airways, Inc.* v. *CAB*, 157 U.S.App.D.C. 281, 287, 483 F.2d 1284, 1291 (1971); *Delta Air Lines, Inc.* v. *CAB*, 147 U.S.App.D.C. 272, 276, 455 F.2d 1340, 1344 (1971); *United Telegraph Workers* v. *FCC*, 141 U.S.App.D.C. 190, 194-195, 436 F.2d 920, 924-925. An evidentiary hearing, the argument runs, is futile before an experiment is conducted because the experiment is designed to gather the very evidence that is to be presented at the hearings. Without the experiment, in other words, there is no evidence to hold an evidenciary hearing *with*. We now address these various contentions.[22]

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[22] We note at the outset of this discussion that we do not find compelling the Service's citations to cases in which courts have upheld agency approval, without hearing, of marketplace experiments. *See Network Project, supra; Saturn Airways, Inc., supra; Delta Air Lines, Inc., supra; United Telegraph Workers, supra.* As an initial matter, we observe that the cases do not stand for the proposition that the relevant agencies would have abused their discretion had they held hearings on the proposals before them. We do not miss the point that those courts apparently believed the nonhearing route to be preferable; nor do we necessarily disagree. At most, however, these cases establish only that it was reasonable under the facts presented not to hold a full-blown evidentiary hearing for the limited experiments proposed. That is far from holding that it necessarily and in all circumstances would be unreasonable or an abuse of discretion to hold a hearing. More significantly, although we might vote otherwise were this a legislative rather than judicial forum, for the reasons that follow we think that Congress could reasonably have intended the hearing mechanisms of the Postal Reorganization Act to be triggered by proposed marketplace experiments, and therefore are not disposed to upset, on these grounds, the conclusion that we tentatively reached by a plain reading of the statute.

We observe, first, that the postal context differs in significant ways from the regulatory contexts dealt with in the cases cited by the Postal Service. The Postal Rate Commission has but one entity to regulate, not a multitude of smaller ones. The bureaucratic burden of holding hearings on marketplace experiments is therefore not likely to be as great as a similar burden would be if imposed on other agencies. Therefore, we reasonably believe (as could the Congress) that delays can be minimized. Further, because in the postal area the entire regulated industry is represented by one managerial unit and also because of the sheer size and economic importance of the Postal Service, the potential economic havoc that the single unit could wreak with an imprudently structured experiment is enormous. Most critically, even if no evidentiary hearings were in fact held in the cases cited by defendant, the experimental tariffs were at least filed with the regulating agency, and opportunity for comment to the agency by adversely affected parties was present. The agency and those whose interests they protect had advance warning and a chance to consider the implications of the proposal. If circumstances warranted, the agencies could have suspended the rate and held hearings; at least there was provision for some preliminary evaluation. In our case, unless the Postal Service goes to the Postal Rate Commission under § 3622 or § 3623, there is *no* review at all and *no* opportunity for notice or response, abbreviated or otherwise. The Postal Service's position allows

the goal of management discretion and initiative to swallow up the goal of exposure and review in the public interest of proposed actions that impact on the public. The Postal Service's own cited cases reveal that even when evidentiary hearings are not held for planned marketplace experiments, the regulated must at least check in with the agency before going out and experimenting in the marketplace; there is *some* sort of review. We do not think it unreasonable, in a regulatory context where review is either all or nothing, to think that Congress intended all.

Secondly, we are not convinced that the hearing requirement is as inherently inflexible and inappropriate as the Postal Service would have us believe. Although most of the factors the Postal Rate Commission is to consider in reviewing proposed rate or classification changes, 39 U.S.C. §§ 3622(b), 3623(c), do seem out of place when applied to experiments, the review criteria are explicitly elastic, with the Rate Commission instructed to consider in general "the policies of this title *and*" in particular "such other factors as the Commission deems appropriate." *Id.* §§ 3622(b)(9), 3623(c)(6) (emphasis added). Thus the statutory criteria are not limitations on the Commission's review authority. Moreover, considerations not "appropriate" to a permanent rate change may be "appropriate" to an experiment. In any case, at least one of the specific factors relevant to rate changes is directly responsive to the competitive impact concerns expressed by plaintiffs in this litigation, for the Commission's attention is di-

rected to "the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matters other than letters . . . ." *Id.* § 3622(b)(4). The Rate Commission, therefore, would not be bound to an exercise in futility in reviewing a proposed experimental rate.

We realize, of course, that the thrust of the Postal Service's argument goes not to feasibility but to intent. That is, even assuming that the Commission could develop and apply meaningful criteria appropriate to a proposed experiment, the general inapplicability of the statutory review criteria is said to be indicative of the fact that Congress never intended experiments to be reviewed under these sections. The "elastic clause" in §§ 3622 and 3623, the Postal Service might continue, signifies only Congress' recognition that it may not have thought of every factor relevant to a permanent rate or classification change, not that the sections were designed to cover experimental changes.

This is, we think, a rather wooden approach to statutory construction. It allows statutes little vitality to cover more than the paradigm. Realistically, it is entirely possible that Congress did not explicitly consider the problem of marketplace experiments at all. Neither our research nor that of the parties has uncovered any mention of such experiments in the legislative history. Legislators do not always think of everything; that is why catch-all provisions like 2633(b)(9) and 3623(c)(6) are included in

statutes. Our task in such an unprovided for case is to determine how the structure and purpose of the Act applies to the situation. Our modus procedendi is to begin with the statutory language and then to measure that language against what we know of the congressional intent.

Nor do we think that the requirement of APA-style evidentiary hearings forces the Rate Commission into a Procrustean bed unsuited to experimental rate review. We must presume that the Postal Service's decision to conduct a particular experiment with particular conditions was not the product of a fit of whimsy but was based on some objective information and guided toward some articulable goal. Obviously, the Commission could not evaluate the evidence the experiment was designed to generate, but it could review the information on which the initial decision to experiment was based. An evidentiary hearing need not be a meaningless or futile exercise merely because the subject matter is an experimental rate; the policies of the Act can still provide meaningful standards. Further, the means for applying those criteria need not follow the ossified and interminable format the Postal Service fears. Both the Postal Reorganization Act, 39 U.S.C. § 3624(b) and the Administrative Procedure Act, 5 U.S.C. § 556(c)(5) & (6) contemplate streamlined proceedings to achieve "utmost expedition consistent with procedural fairness to the parties," 39 U.S.C. § 3624(b). Consistently with the APA, the Commission could, and we trust would, tailor the scope and conduct of its hear-

ings considerably when the issue before it is not a nationwide and permanent rate change but a limited and temporary experimental rate change. Indeed, we strongly urge the Commission to formulate and adopt such procedures.[23]

It is not for us, however, to articulate the evidentiary factors the Commission might consider and to erect the procedural structure in which it would conduct its review. Our role is confined to determining whether, consistently with the statutory purposes, Congress might reasonably have intended, as the plain language suggests, that the Postal Service go to the Postal Rate Commission before any rate or mail classifications are changed, experimentally or otherwise. We are satisfied that the requirements of evidentiary hearings as set out in the Postal Reorganization Act could reasonably and consistently with statutory purpose be applied to marketplace experiments.

4. *Significance of 39 U.S.C. § 3661*

Finally, the Postal Service observes under 39 U.S.C. § 3661, Postal Rate Commission involvement

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[23] In fact, the Postal Rate Commission did conduct expedited proceedings under 39 U.S.C. § 3661 when the Postal Service began to provide service to all first-class mail comparable to that previously provided airmail only. *See* 40 Fed.Reg. 20866 (1975); P.R.C. Docket No. N75-2; Reply of the United States Postal Service to Plaintiff's Trial Memorandum 5 n.1. In any case, the provisions for temporary rates would be applicable, 39 U.S.C. § 3641, putting an upper limit on the time a proposed experiment could be blocked by bureaucratic footdragging. *See* note 3 *supra* & accompanying text.

in service changes is triggered only when the Postal Service plans "a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis . . . ." 39 U.S.C. § 3661(b). Construing this section, the Fifth Circuit has held that, when the issue is changes in postal services, the Act does not require an advisory opinion from the Postal Rate Commission before implementation of the change unless (1) there has been a "change" in a quantitative sense, (2) there has been a meaningful impact on service, and (3) the change affects service on a nationwide or substantially nationwide basis. *Buchanan* v. *United States Postal Service*, 508 F.2d 259 (5th Cir. 1975). *See also Wilson* v. *United States Postal Service*, 441 F.Supp. 803 (C.D.Calif.1977). The Postal Service apparently contends that these requirements are also applicable to rate and classification changes under §§ 3622 and 3623 in determining whether Rate Commission intervention is mandated. Reply of the United States Postal Service to Plaintiff's Trial Memorandum, 6, 8-16. The Postal Service argues that these requirements are not met in the case of the Service Test Plan and that therefore the Commission need not be consulted.

The basis on which the Postal Service apparently transposes the requirements of § 3661 to §§ 3622 & 3623 is not clear, but presumably the point is that § 3661 provides insight into the congressional conception of the role of the Postal Rate Commission. It

is only in the major matters—*i.e.*, matters that have nationwide or substantially nationwide impact—[24] the argument continues, that Congress envisioned Rate Commission involvement. The Service's apparent contention is that what Congress made explicit in § 3661 is implicit in §§ 3622 & 3623, and further that, since an experiment of limited scope and temporary duration is not a change of significance on a nationwide scale, Rate Commission review is not mandated.

We have addressed this contention in Part II.A. *supra*. As that discussion makes clear, we do not find this argument convincing; indeed, the citation to § 3661 seems to cut in favor of the plaintiffs rather than the Postal Service. If Congress specifically limited Commission involvement in service changes to "nationwide or substantially nationwide" changes, it is apparent that it knew how to circumscribe Commission jurisdiction. Since Congress did not also do so for rate or classification changes, we might as well be justified in taking the different formulations to indicate affirmatively that marketplace experiments involving rate or classification changes are grist for

[24] It seems to us that the matter of "substantially nationwide impact" is the only issue under the *Buchanan* rubric even arguably in question here, and then only if "nationwide" be construed in a postal user rather than geographic sense, for the Service Test Plan does have broad geographic effect. *See* notes 5 & 7 *supra*. We have no doubt that as to the shippers participating in the Service Test Plan there has been a quantifiable "change" in rates and mail classifications that are "meaningful" in impact.

the Commission's mill, whether or not the changes have nationwide or substantially nationwide effect.[25]

III. *Conclusion*

The end of our inquiry brings us back to where we began—the plain meaning of the statutory language. The Postal Service asks us to hold that a bona fide experiment, although it may in fact involve at least temporarily changing a limited number of shippers new rates, does not constitute a rate change within the meaning of the Postal Reorganization Act. In essence, the argument is that a change in rates under the statute is only a *systemwide* change; merely because twenty or so shippers' rates have been changed does not mean that there has been a statutory rate change so as to trigger mandatory Rate Commission review. The Postal Service has argued that legislative intent, postal history, the structure of the Act, and broad regulatory context all point to excluding experimental rate changes from the requirements of notice and hearing.

[25] From all that appears, § 3661 would require Commission review of a nationwide experimental change in services. Indeed, the Postal Service appears to concede that "preparatory activities" of the Postal Service, though affecting "the Postal Service's development function" are subject to hearing procedures if "substantially the entire postal system" is affected. Taken at face value, this seems to mean that the issue is not the experimental nature of the change, but the scope. As the text of the opinion shows, however, there is no textual limitation on the scope of changes subject to review under §§ 3622 & 3623, as there is under § 3661.

We confess that the Postal Service's argument is not unappealing. The statute is not—as statutes seldom are—crystal clear, and the legislative purposes seem to meet at cross-currents. In many ways it might well be preferable to permit some measure of marketplace experimentation to the Postal Service without imposing the rigors of Commission review. Perhaps, under some abstract "reasonableness" test the Postal Service would prevail; perhaps, divorced from the statutory framework, we could be convinced that the Postal Service's allocation of responsibility is the more reasonable.

The words of the statute, however, provide the framework for our musings on reasonableness, and those words are inclusive, unmodified, and mandatory. *See* 39 U.S.C. §§ 3622(a) & 3623(b). *Compare* 39 U.S.C. § 3661(b). However we align the arguments and considerations, we cannot avoid the fact that the postage rates and mail classifications applicable to the participants in the Service Test Plan have been changed from their previous configuration. An interpretation based on the plain language of the provision at issue does not distinguish between various types of rates and mail classifications. Such an interpretation is not inconsistent with the purposes of the Act or with the structure of the Act as a whole. Although we have explored at great length a number of considerations alleged to militate against application of the plain meaning principle, they have failed to dent its armor.

Moreover, interpretation based on plain meaning does, on its own terms, make sense and positively promote some of the statutory purposes. Faced with plain language that is reasonable in light of the rest of the statute and the legislative intent, the result is clear. When the Postal Service seeks to experiment with the rates postal patrons pay for sending their mail through the postal system, it must first request a recommended decision from the Postal Rate Commission. The permanent injunction requested by the plaintiffs accordingly must issue.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-555

UNITED STATES POSTAL SERVICE, PETITIONER

v.

UNITED PARCEL SERVICE, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1980.

/s/ Wm. J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 28 day of December, 1979.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1386

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

UNITED PARCEL SERVICE, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May the United States Postal Service offer shippers new and different rates, denominated as experimental or test rates, for parcel delivery service, and institute as a self-styled experiment a new class of parcel delivery service, without prior public notice and submission of the new rates and class of service to the Postal Rate Commission in accordance with the requirements of Sections 3622 and 3623 of the Postal Reorganization Act, 39 U. S. C. §§ 3622, 3623?

STATEMENT OF THE CASE

The question in this case is whether the United States Postal Service, which has a statutory monopoly in its largest class of service (letter mail), may offer a new class of service and drastically reduce its rates for package delivery, where it competes directly with private enterprise firms, without complying with the procedures and safeguards Congress prescribed in Sections 3622, 3623, and 3641 of the Postal Reorganization Act of 1970, as amended, 39 U. S. C. § 101 *et seq.* (the "Act"). The Postal Service, an enterprise with tax-free revenues (including substantial governmental subsidies) of more than $17 billion dollars, seeks to avoid the requirements of the Act on the ground that the new rates and class of service were offered only to certain high-volume shippers as an experiment, even though the Act contains no such exemption from its requirements as to prior public notice and Postal Rate Commission review.

The Postal Service would read into the Act an exemption for such experiments, designed to enhance its competitive position with respect to private enterprise firms, despite the fact that any experimental rates and classes of service offered by other regulated entities—including competitors of the Postal Service such as Respondents—are subject to the jurisdiction of their respective regulatory agencies (see page 8, n. 3, *infra*). Yet, as the district court stated,

> ". . . because in the postal area the entire regulated industry is represented by one managerial unit and also because of the sheer size and economic importance of the Postal Service, the potential economic havoc that the single unit could wreak with an imprudently structured experiment is enormous." Appendix D at 106a, 455 F. Supp. at 878.

Respondents submit that the district court and the court of appeals were correct in following the clear language of the Act and rejecting the Postal Service's claim to special treatment. The relevant facts are as follows.

In October of 1977, the Postal Service began providing, as an "experiment," a new parcel delivery service under contracts with certain selected high-volume shippers. Appendix D at 60a-61a, 455 F. Supp. at 861. The new service (the "Contract Parcel Service") provided for fixed fee rates based on the average weight of the parcels shipped and, unlike the Postal Service's parcel post rates generally in effect, without regard to the distance the parcels were shipped. Appendix D at 61a, 455 F. Supp. at 861.

In order to be selected by the Postal Service to receive the experimental rates and service, a shipper was required to tender a minimum of 50 parcels per mailing and not less than 250 parcels a week. Appendix D at 61a-62a, 455 F. Supp. at 861-62. If the average weight of the shipper's parcels was five pounds or less (based on infrequent, sample weighings), the rate for each parcel was 87¢, regardless of the actual weight of each parcel and regardless of the distance the parcel was carried, so long as the delivery destination of the parcel was not outside the geographic area covered by the Postal Service bulk mail facility serving the shipper.[1] Appendix D at 61a, 455 F. Supp. at 861. In contrast, the Commission-approved parcel post rates in effect at the time of the experiment for parcels weighing five pounds or less were as high as $1.36, depending on the actual weight of the parcel and the distance the parcel was carried. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 861, n. 7. Under the experiment, if

1. A single bulk mail facility serves substantial areas, sometimes more than several states. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 861, n. 7.

the average weight of the shipper's parcels was over five pounds but not greater than twenty pounds, the rate for each parcel was $1.15. Appendix D at 61a, 455 F. Supp. at 861. The Commission-approved rates for twenty pound parcels varied from $1.58 to $2.93. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 878, n. 7.

Thus, as the district court found, the experimental rates were "significantly less" than the corresponding parcel delivery rates which had been approved by the Commission. Appendix D at 61a, 455 F. Supp. at 861.[2]

The Postal Service never publicly announced the implementation of the Contract Parcel Service, nor did it follow the provisions of the Postal Reorganization Act relating to the implementation of new postal rates and classes of service. See 39 U. S. C. §§ 3622, 3623, 3641.

When UPS learned of the implementation of the Contract Parcel Service, it promptly instituted suit under 39 U. S. C. § 409 ("Suits by and against the Postal Service") and 28 U. S. C. § 1339 (actions relating to the postal service) to enjoin further rendition of the new class of service at the new rates. The Honorable Edward R. Becker of the United States District Court for the Eastern District of Pennsylvania entered a permanent injunction on July 19, 1978. See Appendix D, 455 F. Supp. 857. The United States Court of Appeals for the Third Circuit, in an opinion by the Honorable Leonard I. Garth, affirmed the district court's action on August 7, 1979. See Appendix A, 604 F. 2d 1370. The Honorable A. Leon Higginbotham, Jr., filed a dissenting opinion. Appendix A at 29a-50a, 604 F. 2d at 1382-89. On October 9, 1979, a Postal Service petition for rehearing was denied by the full court of appeals, with only Judge Higginbotham dissenting. See Appendix C.

2. On September 8, 1978, the Postal Service filed with the Postal Rate Commission a request for a recommended decision in which the Postal Service proposed, *inter alia*, to "restructure" the Commission-approved rates and conditions of service for parcel post. Many features of the September 8 proposal are strikingly similar to the features of the Contract Parcel Service. On December 5, 1979, the Commission issued its recommended decision rejecting, on the merits, the changes proposed by the Postal Service in Commission Docket No. MC78-1. **Parcel Post Proposal, 1978,** Postal Rate Commission Docket No. MC78-1 (Dec. 5, 1979).

The district court and the court of appeals both held that Sections 3622 and 3623 of the Act apply to every change in "a rate or rates of postage" (39 U. S. C. § 3622) or in the mail classification schedule which is made available to any segment of the public. After an exhaustive examination of the Act, its legislative history, former 39 U. S. C., and judicial authority under other federal regulatory schemes, the district court concluded:

> "When the Postal Service seeks to experiment with the rates postal patrons pay for sending their mail through the postal system, it must first request a recommended decision from the Postal Rate Commission." Appendix D at 115a, 455 F. Supp. at 881.

Similarly, the court of appeals held:

> "Under the Act no distinction is made in favor of experiments or tests which involve changes in rates or mail classification. Rather, the Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission." Appendix A at 13a, 604 F. 2d at 1375.

The Postal Service now seeks certiorari.

REASONS FOR DENYING THE WRIT

I.

Contrary to the Postal Service's Assertions, the Action of the Courts Below Will Not Hamper Legitimate Postal Service Experimentation.

The thrust of the Postal Service's Petition is that the action of the district court and of the court of appeals is contrary to the congressional intent to ". . . rid the mail system of inefficiencies attributable to political interference and to a lack of effective, centralized management authority" (Petition, page 12). This argument is based on an attempt to create the impression that the district court and the court of appeals have held that the Postal Service may not engage in any innovation or experimentation whatever in developing new postal services at fair and reasonable rates. The fact is that neither the district court nor the court of appeals has held any such thing.

The courts below have *not* held that the Postal Service may not experiment with new mail processing machinery and equipment, new mail handling methods, or other new procedures in an effort to increase postal efficiency or otherwise improve the day-to-day service, management, and operations of the Postal Service. Such experiments, which are at the heart of the concept of management authority and flexibility, are unaffected by this case.

Similarly, despite the Postal Service's suggestions to the contrary, the courts below have not precluded all Postal Service experimentation prior to public notice and review by the Postal Rate Commission in the area of the development of new classes of service and postal rates. Here too, the Postal Service remains free to conduct, without prior public notice or Commission review, whatever

experiments it wishes, *provided it does not actually offer new rates and classes of service to any members of the public.* Thus, the district court specifically stated:

> ". . . Commission jurisdiction over what we have termed 'marketplace experiments' would not entail such jurisdiction over *all* experiments. The Postal Service would remain free unilaterally to engage in whatever experimentation it saw fit so long as the experiment did not impact upon the actual rate someone paid for his or her postal service. Dummy packages could be mailed to test sorting machines, costs of processing, efficiency of operations, etc. . . . None of these things would raise the spectre of Rate Commission interference with management's institution or conduct of experiments." Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16.

Indeed, in the case of the Contract Parcel Service at issue here, all of the Postal Service's stated objectives could have been achieved without actually providing a new class of service at discount rates to certain selected high-volume shippers. Experiments of the type referred to by the district court would permit the Postal Service to determine the appropriateness of minimum volume, weight, machinability, and other conditions of service, the operational feasibility of rendering the service, the cost of rendering the service, the adequacy of the hypothetical rates, and other similar matters without the need actually to institute new rates and a new class of service for selected shippers.

The Postal Service also remains free to conduct market studies and to survey shippers in order to determine whether there is a market for the hypothesized rates and class of service. See Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16, where the district court noted that

"[m]arket surveys could be taken to determine shipper receptivity to proposed new services." In fact, the Postal Service did make limited use of this widely-used technique in this case when it surveyed "dozens" of shippers for the purpose of selecting "acceptable" test participants. Stipulation of Facts, ¶ 8, reproduced at pages 29-30 of the appendix filed in the court of appeals.

Finally, even were the Postal Service correct that, for some reason which is not apparent, a new rate or class of service could not be adequately evaluated without actually being made available to mailers, the Postal Service may, like other regulated entities,[3] file the proposed marketplace experiment with the agency which oversees its rate and service offerings. Postal Rate Commission review of proposed experimental rates and classes of service need not impose intolerable burdens on the Postal Service. The Commission has ample authority under Section 3624(b) of the Act, 39 U. S. C. § 3624(b), to expedite requests to approve experimental rates or classes of service, if appropriate, by defining the scope and contour of its hearings. And, like other regulatory agencies, the Commission could, in appropriate circumstances, determine that a particular

3. Cases arising under other federal regulatory schemes indicate that regulatory agency jurisdiction over experimental rates and classes of service is universally assumed and recognized. See, *e.g.*, **Network Project v. FCC,** 511 F. 2d 786, at 794 (D. C. Cir. 1975); **Delta Air Lines, Inc. v. CAB,** 455 F. 2d 1340 (D. C. Cir. 1971); **United Telegraph Workers v. FCC,** 436 F. 2d 920 (D. C. Cir. 1970); **American Airlines, Inc. v. CAB,** 359 F. 2d 624, at 633 n. 26 and accompanying text (D. C. Cir.), *cert. denied,* 385 U. S. 843 (1966); **General Increases—Eastern Central Territory,** 316 I. C. C. 467, at 485 (1962); **River Terminals Corp. Class & Commodity Rates,** 14 M. C. C. 542 (1939). Thus, motor carriers such as Respondents which compete with the Postal Service may not serve even one shipper for one day on one trip, even as an experiment, without first obtaining operating rights from the Interstate Commerce Commission, and any such transportation by a motor carrier for compensation may be offered only pursuant to a published tariff filed with the Interstate Commerce Commission. See Appendix D at 106a-107a, 455 F. Supp. at 878.

experimental program could be approved (with proper restrictions) on the basis of a less searching inquiry than is conducted in the case of nonexperimental changes in rates or classes of service. Compare **Connecticut Comm. Against Pay TV v. FCC,** 301 F. 2d 835, 837 (D. C. Cir.), *cert. denied,* 371 U. S. 816 (1962) ("The distinguishing characteristic . . . in this case is the experimental or trial basis upon which the system is to operate . . . .") with **National Ass'n of Theatre Owners v. FCC,** 420 F. 2d 194, 199 (D. C. Cir. 1969), *cert. denied,* 397 U. S. 922 (1970). As the district court noted in this case, the Commission has in the past expedited proceedings initiated by the Postal Service. Appendix D at 110, n. 23, 455 F. Supp. at 879, n. 23.

In short, the alleged dire consequences which are the basis for the Postal Service's Petition have no foundation in fact. Contrary to the impression which the Postal Service seeks to create, the decisions which the Postal Service would have this Court review are carefully limited so as not to restrict the ability of postal officials to manage the day-to-day operations of the Postal Service. Nor will those decisions hamper the development of new classes of mail and rate structures.

The holdings of the courts below certainly do not raise "an important question of federal law which has not been, but should be, settled by this court." U. S. Sup. Ct. Rule 19(1)(b). Accordingly, the instant Petition for a writ of certiorari should be denied.

II.

The Statutory Interpretation Issue and Arguments Raised by the Postal Service Were Carefully Considered and Rejected by Both Courts Below, and Are Without Substance.

The Postal Service does not raise in its Petition any arguments which were not carefully considered and re-

jected by both the district court and the court of appeals. In fact, in its comprehensive opinion, the district court went beyond the contentions made before it by the Postal Service (see, *e.g.*, Appendix D at 69a, n. 14, 455 F. Supp. at 864, n. 14) and examined in great detail the language of the Act, its legislative history, former 39 U. S. C., and judicial authority under other federal regulatory schemes in an effort to find some basis for the Postal Service's argument that new and different rates and classes of service made available to the public on an experimental basis are not subject to Sections 3622 and 3623, despite the absence of any exemption for experimental rates or classes of service in the all-inclusive language of those sections. But, despite its exhaustive search for some justification for the Postal Service's position, the district court concluded that the plain meaning of the Act requires prior public notice and submission to the Postal Rate Commission of *all* new or different postal rates and classes of service.

With respect to the Postal Service's management flexibility argument, the district court stated:

> "We recognize and weigh heavily the congressional goal of greater managerial flexibility, but also recognize another congressional purpose that finds its incarnation in the Postal Rate Commission. The Commission's existence insures that an agency independent of the Postal Service will provide for public notice and hearing . . . ." Appendix D at page 81a, 455 F. Supp at 869.

The district court went on to note that "[t]he very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom." Appendix D at 83a, 455 F. Supp. at 869. After full consideration of the Postal Service's management flexibility argument, the district court concluded:

> "Mere invocation of the need for and purpose of managerial discretion in experimentation, therefore, cannot prevail, for Congress has unmistakably put limits on that discretion." Appendix D at 83a, 455 F. Supp. at 869.

Likewise, the court of appeals recognized that, under Section 403(a) of the Act, the Postal Service has a duty to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." See Appendix A at 12a, 604 F. 2d at 1375, quoting 39 U. S. C. § 403(a). But the court of appeals correctly found that this general duty does not authorize the Postal Service to ignore "the specific and plain provisions of the rate and classification sections" of the Act. Appendix A at 24a, 604 F. 2d at 1380.

In arriving at its conclusion, the Court of Appeals for the Third Circuit relied in part on an earlier decision which also dealt with the Commission's jurisdiction under Section 3622 of the Act, in which the Court of Appeals for the District of Columbia Circuit recognized that ". . . a general powers provision like [former] section 404(6) [now section 404(a)(6)] may not ordinarily override a specific provision such as section 3622 . . . ." **National Ass'n of Greeting Card Publ. v. United States Postal Service,** 569 F. 2d 570, at 597 (D. C. Cir. 1976) (hereinafter, **"NAGCP-I"**), quoted by the court of appeals in its decision here at Appendix A, page 25a, 604 F. 2d at 1380.[4] Significantly, in **NAGCP-I** the Court of Appeals for the District of Columbia Circuit held, as did the district court here, that "a plain reading is the proper reading of section 3622." 569 F. 2d 570, at 596. It went on to state:

4. The judgment in another case which was consolidated with **NAGCP-I** for purposes of briefing and argument was vacated on another issue not relevant here. **United States Postal Service v. Associated Third Class Mail Users,** 434 U. S. 884 (1977).

> ". . . any reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management . . . . The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates . . . , and its authority therefore reasonably extends to all aspects of such decisions . . . ." 569 F. 2d at 597.

The district court here, relying in part on **NAGCP-I** as well as on its own analysis of the Act, also concluded:

> "The elaborate divisions of responsibility between Congress and the Post Office that had evolved over decades of congressional regulation gave way in the Postal Reorganization Act to a more predictable and principled division of responsibility. Management was vested in the Postal Service, rate and classification supervision in the Postal Rate Commission." Appendix D at 81a, 455 F. Supp. at 868-69.

The Postal Service's management flexibility argument is clearly undermined by the language of Section 403(a) itself. In addition to providing that the Postal Service shall "plan" and "develop" efficient postal services at reasonable rates, Section 403(a) also requires the Postal Service to "*provide* adequate and efficient postal services at fair and reasonable rates" (emphasis added). Clearly, the Section 403(a) duty to "provide" postal services at fair and reasonable rates is subject to the jurisdiction of the Commission under Sections 3622 and 3623. Otherwise, the comprehensive ratemaking and classification program spelled out in the Act would be meaningless. Yet the Postal Service furnishes no reason to explain why the duty

to provide postal services is clearly subject to the requirements of Sections 3622 and 3623, whereas the duty to plan and develop postal services imposed in the very same sentence is said to be exempt from those same requirements by virtue of the language of Section 403(a).

Significantly, where Congress intended to limit the Commission's jurisdiction, it did so explicitly. Thus, Section 3661 of the Act expressly limits the Commission's role as to a "change in the nature of postal services" to changes which "will generally affect service on a nationwide or substantially nationwide basis." 39 U. S. C. § 3661. In contrast, Section 3622 requires the Postal Service to request a Commission decision on changes in "*a rate* or rates of postage." 39 U. S. C. § 3622(a) (emphasis added). The use of the phrase "a rate" together with the plural "rates" demonstrates that Congress intended the Commission's Section 3622 jurisdiction to apply even if only one rate is to be changed.

Section 3661 shows that Congress knew how to limit the Commission's jurisdiction over changes in rates and classes of service had it chosen to do so. Its failure to use similar limiting language in Sections 3622 and 3623 confirms the all-inclusive nature of the Commission's jurisdiction under those sections.

The Postal Service suggests that the legislative history of the Act provides support for the proposition that the all-inclusive language of Sections 3622 and 3623 of the Act should, in effect, be rewritten by the courts so as not to apply to new or different rates and classes of service offered to the public as part of an experiment designed solely by the Postal Service. The only statement cited by the Postal Service in support of its position—other than general expressions concerning the desirability of giving postal management ". . . the unfettered authority and freedom . . . to *maintain and operate* an efficient service,"

S. Rep. No. 912, 91st Cong., 2d Sess. at page 2 (1970) (emphasis added), quoted at Petition, page 12—is a statement taken out of context from the report of the House Committee on Post Office and Civil Service on an earlier version of the bill to the effect that "[t]he Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States." H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 9 (1970), *reprinted in* 1970 U. S. Code Cong. & Ad. News 3639, at 3657. But that statement does not support the position of the Postal Service here. As we have pointed out (pages 6-9 *supra*), the decisions of the courts below do not prevent the Postal Service from engaging in research and development efforts looking toward the development of new postal services. Instead, the court of appeals specifically stated:

> "We do not here hold that all 'test plans' must be submitted to the Rate Commission (see *e.g.* Part III B, *supra* . . .). We do hold, however, that any proposal which would effect a change in mail classification or a rate, including a test or experiment embodying those features, must be submitted to the Rate Commission, no matter how experimental, temporary, or limited in scope the change." Appendix A at 26a, 604 F. 2d at 1380.

See also the opinion of the district court, Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16, quoted at page 7, *supra*. As the district court held,

> ". . . where the 'experiment' does not consist of mock packages mailed at hypothetical rates but instead requires the payment of real postage by real shippers for real parcel post service, there have been changes, however limited, in rates of postage and classifications of mail that affect these shippers and that fall within a 'plain meaning' reading of the statutory language." Appendix D at 68a, 455 F. Supp. at 864.

Contrary to the Postal Service's unsupported contention, the legislative history of the Act confirms that *all* postal rates and classifications, no matter how limited in extent and applicability, are subject to prior public notice and submission to the Commission before they may be offered to any segment of the public. See, *e.g.*, H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 42 (1970), 1970 U. S. Code Cong. & Ad. News at 3693 (stating that the Postal Service would be subject to ". . . the general requirement of 30 days' advance public notice of *all* changes in rates, classification, or the rate structure and of filing such proposed changes with the Rate [Commission]") (emphasis added); S. Rep. No. 912, 91st Cong., 2d Sess. at page 14 (1970), where the Senate Committee stated (emphasis added):

> "In discharging the highly important responsibilities vested in the Commission, it must exercise its best judgment to insure that *all* postal rates, fees, and classifications are reasonable and equitable, and to insure that the rights of *all* mail users are protected . . . ."

Finally, the Postal Service suggests (in a footnote) that it retains the powers which were exercised by the Postmaster General of the then Post Office Department before the Act was passed in 1970. This contention was carefully considered and rejected by the district court. Appendix D at 77a-86a, 455 F. Supp. at 867-70. It had previously been rejected by the Court of Appeals for the District of Columbia Circuit in **NAGCP-I**, page 11, *supra*,

where the Postal Service argued that it was not required to submit changes in fees for special postal services to the Commission because, under prior law, the Postmaster General of the then Post Office Department had sole authority to set such fees. See **NAGCP-I**, *supra*, 569 F. 2d at 597.

It is clear that the Act represented "a complete break with the past." S. Rep. No. 912, 91st Cong., 2d Sess. at page 2 (1970). See also, *e.g.*, H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 6 (1970), 1970 U. S. Code Cong. & Ad. News at 3654. Thus, the **NAGCP-I** court noted "the fundamental change Congress intended in creating the Postal Rate Commission." 569 F. 2d at 597. Indeed, the very purpose of the Act was to restructure completely the manner by which postal rates and classes of service are determined. Clearly, the fact that Congress desired to permit the Postal Service to manage its own business does not remove the Postal Service in any way from regulatory requirements with respect to rates and classes of service established in the same Act.

The Postal Service did not make this argument based on former law before the court of appeals. Nevertheless, it now invokes it before this Court in an effort to obtain certiorari.[5] The Postal Service's belated attempt to resurrect that argument in this Court should be rejected, and its Petition should be denied.

5. The Postal Service also finds it difficult not to argue before this Court that the title of subchapter II of chapter 36 of the Act—"*Permanent* Rates and Classes of Mail" (emphasis added)—demonstrates that Sections 3622 and 3623 do not cover experimental rates and classes of service (see Petition, pages 4, 8-9, n. 3, 15), although it expressly declined to make that argument before the district court. See Appendix D at 102a-103a, n. 21, 455 F. Supp. at 876-77, n. 21. In any event, the district court adequately disposed of any argument based on the use of the term "Permanent" in the subchapter heading. *Id.* Clearly, Congress used the term to distinguish Commission approved rates and classes under Sections 3622 and 3623 from the unreviewed "Temporary Rates and Classes" provided for by subchapter III of chapter 36, 39 U. S. C. § 3641.

CONCLUSION

The holdings of the district court and of the court of appeals do not affect in any way the day-to-day management authority and flexibility of the Postal Service. Nor do they prevent the Postal Service from conducting extensive research and development programs in numerous fields, including programs designed to evaluate new classes of postal service and associated rates. All that the court of appeals and the district court have held is that Section 3622(a) of the Act means what it says when it requires the Postal Service to request the Postal Rate Commission to review "changes in *a rate* or rates of postage or in *a fee* or fees for postal services." 39 U. S. C. § 3622(a) (emphasis added).

The Postal Service concedes that the holding below does not conflict with a decision of any other court of appeals (Petition, page 20). In fact, the decision below is consistent with the approach of the Court of Appeals for the District of Columbia Circuit in the **NAGCP-I** case. Thus, the decisions of the two courts of appeals which have considered the ratemaking and classification provisions of the Postal Reorganization Act are completely consistent, and clearly are not in conflict with each other in any way. See U. S. Sup. Ct. Rule 19(1)(b).

WHEREFORE, Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 79-1386

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES POSTAL SERVICE, PETITIONER

v.

UNITED PARCEL SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY BRIEF FOR THE PETITIONER

Respondents attempt to minimize the importance of the decision below by arguing (Br. in Opp. 6-9) that, notwithstanding the court of appeals' ruling, the Postal Service remains free to engage in meaningful experimentation "with new mail processing machinery and equipment, new mail handling methods, or other new procedures," without first seeking the approval of the Postal Rate Commission. Respondents also suggest (Br. in Opp. 4 n.2) that the Rate Commission has already rejected one version of the reduced parcel post rates embodied in the Local Parcel Service Test Plan.[1] The

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[1]In fact, the 1978 Parcel Post Proposal that was rejected by the Commission differed substantially from the package of rates and services offered to the 20 volunteer shippers that participated in the Local Parcel Service Test Plan. These differences are irrelevant for present purposes, because the significance of the 1978 proceeding

1978 Commission proceeding to which respondents refer, however, demonstrates graphically why the kind of experimentation that respondents regard as legitimate is inadequate to enable the Postal Service to develop new rate and classification proposals that stand a reasonable chance of being approved by the Commission.

The critical feature of the Commission's decision on the 1978 proposal is that the rejection was based on the Service's failure "to provide adequate proof of the conclusions regarding operations, costs, and rate structure upon which the Service's proposal depends." *Parcel Post Proposal, 1978*, Opinion and Recommended Decision, Postal Rate Commission Docket No. MC 78-1, at 11 (Dec. 5, 1979). The Commission concluded that the Service did not present sufficient data in support of (1) the asserted cost differential between machinable and nonmachinable parcels (*id.* at 44-45), (2) the so-called "acceptance adjustment" for existing costs that would not be incurred and new costs that would be incurred if the revised bulk mail classification were accepted (*id.* at 46-47), and (3) the anticipated increase in parcel post volume that the proposal would generate (*id.* at 52-55). The Commission "encourage[d] the Service to conduct further study and data-gathering efforts in order to establish quantifiable relationships among different sub-categories of parcel post mail" (*id.* at 11). At the same time, the Commission warned that it would be able to recommend

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does not depend on the particular characteristics of the rate and classification proposal presented to the Rate Commission. A summary of the details of the 1978 proposal may be found in *Parcel Post Proposal, 1978*, Opinion and Recommended Decision, Postal Rate Commission Docket No. MC 78-1, at 12-27 (Dec. 5, 1979).

rate and classification changes in the future "only if specific, detailed empirical evidence is forthcoming from the Postal Service" (*ibid.*).

It was precisely in order to gather this kind of empirical evidence that the Service undertook the Local Parcel Service Test Plan now at issue. Far from supporting respondents' position, therefore, the Commission decision provides convincing evidence of the need for Postal Service rate and classification experiments before proposed changes are submitted to the Commission. Without the kind of information that such experiments will produce, the Commission will generally be unable to make appropriate findings concerning the statutory criteria for permanent rate and classification changes set forth in 39 U.S.C. 3622 and 3623.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

DOJ-1980-05